Postponed.

M. G.

Miller

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Filed.

Nov. 9th 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 707.

THE UNITED STATES, EX REL. THOMAS McBRIDE, PLAINTIFF IN ERROR,

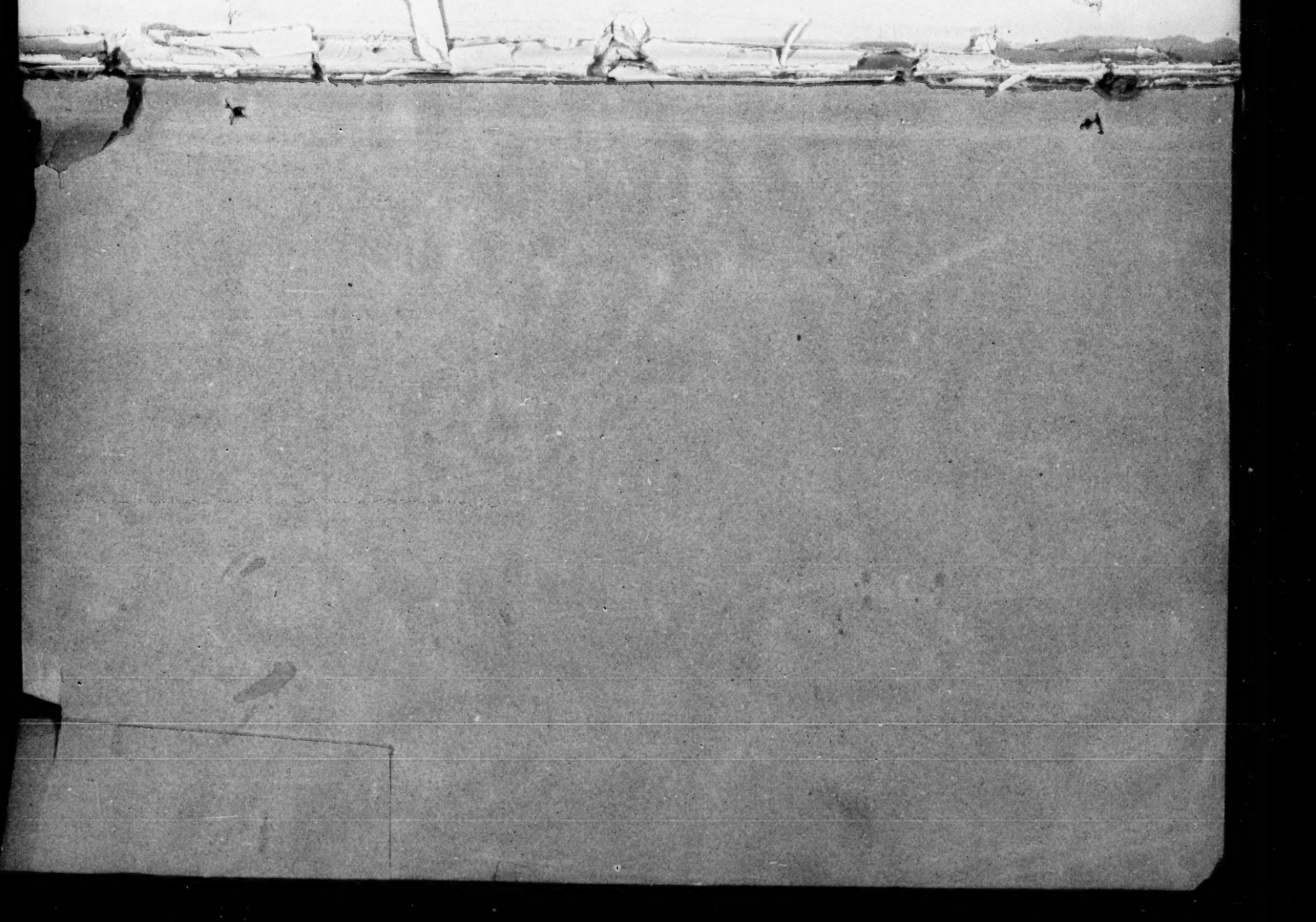
vs.

CARL SCHURZ, SECRETARY OF THE DEPARTMENT OF THE INTERIOR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 21, 1879.

Merrick for Relator.
Atty General for Sec. of Interior.



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a In the supreme court of the District of Columbia, the 17 day of November, 1879.

THE UNITED STATES, EX RELATIONE THOMAS McBride *vs.* CARL SCHURZ, SECRETARY OF THE DEPARTMENT of the Interior.	At law. No. 21200. In error.

Know all men by these presents that we, James H. Mandeville and Walter H. Smith, are bound unto the above-named Carl Schurz, Secretary of the Department of the Interior, respondent, in the sum of five hundred dollars, to be paid to the said Carl Schurz, respondent, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 17 day of November, 1879.

Whereas the above-named plaintiff in error has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named plaintiff in error shall prosecute his said error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES H. MANDEVILLE. [SEAL.]
WALTER H. SMITH. [SEAL.]

Sealed and delivered in presence of—

Approved this 17th November, 1879.

D. K. CARTTER,
Chief Justice.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The United States, ex relatione Thomas McBride, versus Carl Schurz, Secretary of the Department of the Interior, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of November, in the year of our Lord A. D. 1879, and of the Independence of the United States the one hundred and third.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Carl Schurz, Secretary of the Department of the Interior:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States, ex relatione Thomas McBride, is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy ustice be done the parties in that behalf.

j Witness the honorable D. K. Cartter, chief justice of the supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

I hereby certify that I served a true copy of the foregoing writ of error and citation on Carl Schurz, Secretary of the Interior, this 20th of November, 1879.

FRED'K DOUGLASS,
U. S. Marshal.

1 *Petition for mandamus.*

THE UNITED STATES OF AMERICA:

In the supreme court of the District of Columbia, this 11th day of October, 1879.

THE UNITED STATES, EX RELATIONE THOMAS McBride, *versus* CARL SCHURZ, SECRETARY OF THE DEPARTMENT of the Interior.	At law.	No. 21200.

To the supreme court of the District of Columbia:

Your petitioner, Thomas McBride, respectfully represents that he is a citizen of the United States, resident in Utah Territory.

He further represents that in the year 1862 he was a person who had all the qualifications required by the laws of the United States to entitle him to pre-empt one hundred and sixty acres of public lands of the United States, or to enter the same as a homestead.

That having such qualifications he did, in the year 1862, settle upon the following tracts of the public lands of the United States,
2 which were then subject to pre-emption filing or homestead entry, with the intention of appropriating the same under the public land laws of the United States, to wit: The south half (½) of the north-east quarter (¼), and lots numbered one (1) and two (2) of section six (6), township three (3) south, of range five (5) west; said land being

situate in the county of Tooele, in the Territory of Utah, containing a little less than one hundred and sixty acres; that he soon thereafter erected a dwelling thereon, and that he has continuously since then inhabited, occupied, and cultivated the same, and does now inhabit, occupy, and cultivate the same.

That on the 31st day of May, 1869, he appeared before the officers of the land-office of the United States at the proper land-office in Salt Lake City, in the said Territory of Utah, and in due form of law, and within the time required by law, made a homestead entry of the aforesaid tracts of land, and paid the fees required by law for the same.

That after occupying, cultivating, and residing upon said premises for more than five years he, on the 15th day of June, 1874, appeared before the officers of the said land-office in Salt Lake City and made his
3 final proof, showing the character and value of his improvements and the length of time he had lived upon said premises, as required by law and to the satisfaction of the said local land officers, and paid the legal fees therefor and received his final certificate for said premises as a homestead, the same being numbered one hundred and fifty-one.

That his said proof and papers were duly forwarded by said officers to the Commissioner of the General Land Office of the United States, and were found by him to be in all respects in compliance with law and such as to justify and require that a patent should be issued to him for the said homestead premises; and that in accordance with said finding a patent for the said premises was, on the 26th day of September, 1877, duly signed by R. B. Hayes, the President of the United States, and countersigned by S. W. Clark, recorder of the General Land Office, and sealed with the seal of the General Land Office, and duly recorded in book 2, on page 87, of the land records of the United States for the land district of Utah Territory.

He further represents that said patent was in all respects exe-
4 cuted, signed, countersigned, sealed, and recorded as required by the laws of the United States.

He further says that the said patent so executed, recorded, and issued as aforesaid was afterward and on the 3d day of October, 1877, transmitted by the Commissioner of the General Land Office to the local land officers at the said land office in Salt Lake City, with instructions to deliver the same to your petitioner, and the same was received by said local land officers; and thereupon your petitioner appeared at the said last-named land office and demanded of the said officers that said patent should be delivered to him.

Your petitioner further represents that the local officers refused to deliver the said patent to him, and claimed that they did so because they had been instructed by their superior officer, the Commissioner of the General Land Office, to return the said patent to him, the said Commissioner, as by his instructions dated on the 14th day of October, 1878.

Your petitioner further represents that on the 22d day of October, 1878, the said local land officers did return said patent to the
5 Commissioner of the General Land Office, and that the said patent is now in the Department of the Interior and subject to the control of the Secretary of the Interior.

Your petitioner further represents that Carl Schurz is Secretary of the Interior; that while he was Secretary, as aforesaid, and on the 6th day of October, 1879, your petitioner demanded of the said Carl Schurz, as Secretary of the Interior, at his office in the Department of the Interior, that he deliver to your petitioner the said patent; but your peti-

tioner says that the said Carl Schurz, as aforesaid, on the 10th day of October, 1879, absolutely refused and still refuses to deliver the said patent to him.

Your petitioner represents that by reason of said refusal by the said Carl Schurz, Secretary as aforesaid, he is deprived of the means of showing that title to the said premises has, by the laws of the United States, become vested in him, and that he is injured thereby, and that he is entirely without remedy in the premises, unless it be now afforded by the interposition of this honorable court.

6 Your petitioner therefore prays that a writ of mandamus may issue against the said Carl Schurz, Secretary of the Department of the Interior, and that he may be commanded and directed by this court to deliver to your petitioner the said patent for the said homestead premises, and that such other order may be made in the premises as law and justice may require.

WALTER H. SMITH,
JAMES H. MANDEVILLE,
Attorneys for Petitioner.

THE DISTRICT OF COLUMBIA,
City and County of Washington, ss:

I, James H. Mandeville, being first sworn, say, that the said Thomas McBride is a resident of the Territory of Utah, and is now absent from the District of Columbia; that I am his attorney, and that the several matters and things in the foregoing petition, as set forth, are true.

JAMES H. MANDEVILLE.

7 Sworn to and subscribed before me, this 11th day of October, 1879.

R. J. MEIGS, *Clerk.*
By J. R. YOUNG,
Assistant Clerk.

(Endorsed:) No. 21200. Law. The United States ex relatione Thomas McBride versus Carl Schurz, Secretary of the Interior. Petition for mandamus. Walter H. Smith, James H. Mandeville, counsel for relator. Filed Oct. 11, 1879. R. J. Meigs, clerk.

8 *Rule to show cause.*

In the supreme court of the District of Columbia, this 11 day of October, 1879.

THE UNITED STATES EX RELATIONE THOMAS McBride *vs.* CARL SCHURZ, SECRETARY OF THE DEPARTMENT of the Interior.	}	At law. No. 21200.

On reading the petition and affidavit now on file and docketed in the above entitled cause, and upon considering the same, it is, this 11th day of October, 1879, at chambers, ordered: That the respondent show cause on the 27th day of October, 1879, at 10 o'clock a. m., before the supreme court of the District of Columbia, sitting in general term, why a writ of mandamus should not issue as prayed by the said relator; and that a copy of this order be served on the said respondent, Carl Schurz, Secretary as aforesaid.

D. K. CARTTER,
Chief Justice.

9 (Endorsed:) No. 21200. Law. The United States ex rel. Thomas McBride vs. Carl Schurz, Secretary of the Interior. Rule to show cause. Issued Oct. 11, 1879. Rule Book 1, p. 143.

Served copy of this rule on Carl Schurz, Secretary of the Interior, October 11, 1879, at 2.30 p. m.

F. DOUGLASS, *Marshal.*
R. J. MEIGS, *Clerk.*

Filed Oct. 11, 1879.

10 *Supplemental petition for mandamus.*

THE UNITED STATES OF AMERICA:

In the supreme court of the District of Columbia, this 16th day of October, 1879.

THE UNITED STATES EX RELATIONE THOMAS McBride *versus* CARL SCHURZ, SECRETARY OF THE DEPARTMENT of the Interior.	At law.	No. 21200.

To the supreme court of the District of Columbia:

Your petitioner, Thomas McBride, now comes and asks leave to file this his supplemental petition.

He respectfully represents that he demanded of the said Carl Schurz, Secretary of the Interior, the delivery to him of said patent on the 6th day of October, 1879, as is more fully set forth in his original petition, filed on the 11th day of October, 1879. The respondent withheld his answer to said request until the 10th day of October, 1879,
11 when he for the first time informed your petitioner that he refused to deliver said patent.

Your petitioner further represents that on the said 10th day of October, 1879, and within six hours of the time of said refusal by the respondent, the said patent was cancelled by having the following words written across the face of the patent, to wit, "Cancelled by letter G, dated October 10th, 1879. S. W. Clark, recorder G. L. O."

Your petitioner further represents that on the 11th day of October, 1879, about the hour of 1 o'clock p. m., and after the filing of his petition for mandamus, he learned for the first time that said patent had been cancelled, but it was not till the hour of 3 o'clock p. m. on said date that he had official information of the cancellation. He then saw the record of the patent, across the face of which had been written the same words that were written across the face of the patent. A few minutes afterward he received a letter dated October 10th, 1879, and signed by J. M. Armstrong, Acting Commissioner of the General Land Office, which informed him, your petitioner, that his entry,
12 "the patent based thereon, and its record have this day been cancelled, and the local officers at Salt Lake City so advised."

Your petitioner further represents that on the 11th day of October, 1879, about the hour of 1 o'clock p. m., he ascertained that an official letter had been written and signed by J. M. Armstrong, Acting Commissioner as aforesaid, and recorded, but not then mailed, dated October 10th, 1879, and directed to the register and receiver of the United States Land Office at Salt Lake City, instructing them to cancel the

entry of your petitioner for said premises upon the records of said last-named land office.

Your petitioner thereupon appealed to the said Acting Commissioner Armstrong, at the hour of 3 o'clock p. m., on said 11th day of October, 1879, to withhold his letter of instructions to the said register and receiver, but he refused so to do, and claimed that he was acting under the orders of his immediate superior officer, Carl Schurz, the Secretary of the Interior. The said Acting Commissioner Armstrong, on the morning of the 10th day of October, 1879, declared to your
13 petitioner, after refusing to deliver said patent, that he should proceed to cancel the same, as he had been ordered so to do by the Secretary of the Interior, against which act your petitioner earnestly protested.

And your petitioner, upon information and belief, charges the fact to be that said several cancellations were made, and said instructions to the local land officers at Salt Lake City given under the orders of Carl Schurz, Secretary of the Interior; and that such orders were given, and, as your petitioner believes, executed after he demanded his said patent of the respondent herein, and before the respondent had refused to deliver the patent to your petitioner, and therefore before he had a legal right to commence proceedings in mandamus.

Your petitioner further represents that he was present by his counsel, J. H. Mandeville, when service of the order to show cause why a mandamus should not issue, was made upon the respondent herein, which was at the hour of 2.30 p. m., on the 11th day of October, 1879; and that at the moment of said service the said Acting Commissioner
14 Armstrong was present and witnessed the same. Your petitioner then appealed to the respondent, in the presence of said Armstrong, to withhold the letter of instructions to the register and receiver at Salt Lake City, hereinbefore referred to, and the respondent answered, "I will consider your application," or words to that effect. But your petitioner charges that after service of the said order to show cause, when he again invoked the respondent to direct the said Acting Commissioner Armstrong to withhold the official letter addressed to the said local land officers at Salt Lake City, which last interview with the respondent occurred at 3.15 p. m. on the 11th day of October, 1879, and which took place before said letter had been mailed, the respondent answered, "No, I will not"; and thereupon the said letter was mailed to the said local land officers.

Your petitioner further represents that by reason of the said acts of cancellation, and said instructions to the local land officers at Salt Lake City, he is deprived of the means of showing title in himself to the aforesaid lands, and otherwise injured, and that he is entirely
15 without remedy in the premises, unless it be now afforded by this honorable court.

He therefore prays, in addition to his former prayer in his original petition, that at the hearing of this proceeding the said Carl Schurz, Secretary of the Interior, may be commanded and directed by this court to restore the said patent and its record to the condition they were severally in before the said attempted cancellation of the same, and to direct the said local officers, if they may have cancelled the said entry of your petitioner, to restore the same as it was before said cancellation, and that such other order may be made as law and justice may require.

WALTER H. SMITH,
JAMES H. MANDEVILLE,
Attorneys for Relator.

I, James H. Mandeville, being first sworn, depose and say: That I am the counsel of the relator, Thomas McBride; that I have read the above supplemental petition; that the matters and things set forth in the same, not set forth in the original petition, were unknown
16 to me when the said original petition was filed; that the facts stated therein upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

JAMES H. MANDEVILLE.

Sworn to and subscribed before me this 16th day of October, 1879.

R. J. MEIGS, *Clerk*,
By C. ROBINSON, JR.,
Assistant Clerk.

(Endorsed:) No. 21200. At law. The United States ex relatione Thomas McBride, vs. Carl Schurz, Secretary of the Department of the Interior. Supplemental petition for mandamus. Walter H. Smith, James H. Mandeville, counsel for relator. Leave to file entered; 3d m. G. T., p. 427. Filed Oct. 21, 1879. R. J. Meigs, clerk.

17 In the supreme court of the District of Columbia, this 21st day of October, 1879.

* * * * * * *

THE UNITED STATES, EX RELATIONE THOMAS McBRIDE, *versus* CARL SCHURZ, SECRETARY OF THE DEPARTMENT of the Interior. } No. 21200. At law. Mandamus.

Come Walter H. Smith and James H. Mandeville, attorneys of the relator, and present his petition of supplement herein, and move the court for leave to file same, which is granted.

* * * * * * *

18 *The answer of Carl Schurz, Secretary of the Interior, to the rule to show cause why a mandamus should not be granted.*

In the supreme court of the District of Columbia.

IN THE MATTER OF THOMAS McBRIDE *vs.* CARL SCHURZ, SECRETARY OF THE INTERIOR. } At law. No. 21200.

The respondent, Carl Schurz, Secretary of the Interior, answering, says, that the writ of mandamus should not be granted as prayed for by the relator, because he says that he does not know, and therefore cannot say, whether the said petitioner, Thomas McBride, had, in the year 1862, the qualifications required by law to entitle a person to pre-empt one hundred and sixty acres of public land, or to enter the same as a homestead, nor is it material whether he had such qualifications,
19 because it is not alleged, nor is it true as a matter of fact, that he has ever claimed in respect to the lands mentioned in his said petition and amended petition, the benefit of the pre-emption laws of the United States.

Second. This respondent denies that the petitioner settled upon the said

land in 1862 under the homestead act of May 20, 1862, because said act did not become operative until January 1, 1863, and because the said act was not extended to any lands in the Territory of Utah until July 16, 1868; and that the lands so claimed by the petitioner never became subject to the operation of the homestead law, because by the terms of the said law no lands are subject thereto except such as are at the date of the application subject to pre-emption right, and that prior to the date of the act thus extending pre emption laws to that Territory, to wit, on January 12, 1867, the land so claimed by the petitioner had been, by an act of the Territorial legislature, duly and legally passed, made a
20 part of the town of Grantsville, and has ever since, and does now remain incorporated in and a part of said town; and that by the provisions of section ten of the act of September 4, 1841, lands embraced in incorporated towns are excluded from pre-emption claim and entry; and the petitioner did not, in May, 1869, make an entry of the land in question in due form of law, and no such entry could at that or any other time have been legally made. And that the admission of proofs, the issue of final receipts, and the granting of a patent certificate in 1874, by the register and receiver of the Salt Lake City land office, were acts done in violation of law, under the homestead statutes, and that no right to said land was or could be thereby conferred on the said petitioner.

Third. This respondent admits that in September, 1877, a patent was executed and sent to the register at Salt Lake City, but that the same was subsequently recalled, and when demanded by the petitioner
21 the register refused to deliver the same, in compliance with the order of the Commissioner of the General Land Office, and that the said patent was returned to the General Land Office as alleged; and answering, says, that it was the duty of the said Commissioner of the General Land Office to order the said return, and the duty of the said register at Salt Lake City to refuse to deliver the same to the petitioner, and so to return the same to the General Land Office, for the reason that said patent was illegally executed, recorded, and transmitted, and if delivered could not have given the claimant thereunder any right, title, or claim to the land in question, because prior thereto, to wit, in the month of February, 1877, the mayor and corporate authorities of Grantsville made an application in due form of law to the register of the land office at Salt Lake City to make an entry of lands as a townsite under the provisions of the act of March 2, 1867, which said application included, among others, all of the land mentioned and claimed by the petitioner in his petition and amended petition; that the said McBride was at
22 that time in possession of a portion of said land so embraced in the town of Grantsville, and a part of the one hundred and sixty acres described in his petition and amended petition, as a municipal lot, and by the license, as the respondent is informed, of the said municipal authorities, a copy of which said permit is filed, marked Exhibit E; that other portions of the said lands thus claimed by the petitioner in his petition and amended petition were in the possession of other parties as municipal lots, and under the license and permit of the said municipal authorities; which said application of said corporate authorities was, in accordance with the regulations of the Land Department, refused by reason of certain existing homestead entries upon the land applied for, including that of the said relator, McBride. That the other claimants subsequently relinquished their claims in favor of said town, but the said McBride refused to so relinquish; whereupon William R. Judd, mayor of Grants-

ville, made in due form of law an application, dated February 24,
23 1877, for the cancellation of the said entry; and the same was by the register of the land office at Salt Lake City forwarded to the Commissioner of the General Land Office for final adjudication and decision, under the law and established rules and practice of the department; and such action was thereupon afterwards had in due and regular form; that afterwards the said matter came on to a final decision thereof by the Commissioner of the General Land Office, on February 7, 1879.

But while the said application was pending and undecided, through some oversight of the clerk having charge of the certificate, and through failure to endorse thereon the usual order of suspension, said patent was erroneously, negligently, improvidently, and unlawfully, and against the rules and practice of the Land Department, prepared and executed as alleged; but when the same was brought to the attention of the Commissioner of the General Land Office, whose duty it was to perform all executive acts relating to the public lands, including the issuing of patents therefor, he directed the withholding of the said patent;
24 and prior to any demand for its delivery, or any act of acceptance by McBride, the said Commissioner of the General Land Office ordered a hearing as above stated, and proceeded to dispose of the said case as hereinbefore stated; which decision of the Commissioner of the General Land Office was rendered on February 7, 1879, and was a final decision made on full hearing; the said McBride and all others interested therein being present, presenting their claims and contesting the claim of the said municipal authorities; and having been heard, it was judicially determined that the entry, claim and title set up by McBride were invalid and without authority in law, and the cancellation of his claim and entry were directed; a copy of which said decision is filed herewith, and marked Exhibit A; and which this respondent prays may be taken as a part of his answer.

From which decision of the Commissioner of the General Land Office the said Thomas McBride took an appeal on April 8, 1879, to the Secretary of the Interior; a copy of which said appeal is filed
25 herewith, and marked Exhibit B, and which this respondent prays may be taken as part of his answer.

Which said appeal alleged among other things that the said decision was contrary to the preponderance of the evidence; that the decision was contrary to law in that it decided the entry was an illegal entry; because it decided that others were at that time in possession of portions of the property; because it was decided that the premises were within the corporate limits of Grantsville; which said appeal was afterwards brought to a hearing before the Acting Secretary of the Interior, and having been by him fully heard and considered, afterwards, and on October 1, 1879, the said acting Secretary of the Interior delivered his opinion and judgment, affirming the decision so appealed from; a copy of which said decision of the Acting Secretary of the Interior is filed herewith and marked Exhibit C, and which this respondent prays may be taken as a part of his answer, which decision with the papers upon the appeal were returned into the proper custody of
26 the Commissioner of the General Land Office, of which the said relator had notice; and subsequently, to wit, on October 4, 1879, he filed his motion for a rehearing and review, which motion was argued and submitted for the said relator on October 6, 1879, and was by the Secretary of the Interior duly heard, considered, and decided adversely to the said relator on October 8, 1879; and the said relator's application

to modify and recall the prior decision of the first of October, 1879, and to grant a new trial in the case was denied; a copy of which said motion and decision is hereto attached and marked Exhibit D, and prayed to be taken as a part of this answer, which said final decision was in writing, signed by this respondent, and was by him transmitted to the Commissioner of the General Land Office, in whose custody it now is, and where it lawfully belongs.

Fourth. This respondent, further answering, says that since the said final decision and the transmission of the same to the Commis-
27 sioner of the General Land Office, he has not taken any action or made any order in the said matter or in relation to the said case, but that the Commissioner of the General Land Office, in the proper and legal performance of his executive duty and in the proper execution of the said final decision, has had the sole and exclusive control and management of said matter. And the said patent is not now in the possession of this respondent or under his personal control, as seems to be by the said petition alleged; but that all the papers in the said case, including the said patent, are in the office, custody, and control of the Commissioner of the General Land Office, as required by section 453 of the Revised Statutes; that it is no part of the duty of this respondent to perform any ministerial or executive acts relating thereto, but that the action, supervision, and decision in relation to the said patent, the recall, cancellation, and the decision upon the claims of the several claimants to the land in question, which by law were devolved upon this
28 respondent, and have been by him performed in conformity to law, involves the exercise of his judgment and discretion, which he respectfully submits this honorable court has no jurisdiction, power or authority to direct, control, supervise, or review; and that this honorable court has in law no jurisdiction to compel by its writ of mandamus this respondent to do all or any of the things which the relator by his petition prays that the court will order him to do; and that if there were any jurisdiction in the court, by mandamus, to compel the delivery of the patent referred to by the relator, the said writ and command should be addressed to the officer who by law is required to do the act referred to.

Fifth. This respondent, further answering, says that the act in the said petition set out, of recalling the said patent, was, as he is informed and believes, a legal and proper act, and within the appropriate scope and authority of the Commissioner of the General Land Office; because he says that no delivery of the said patent had ever
29 been made, but the same remains still in the custody and control of the General Land Office; and that the register of the land office at Salt Lake City had the same in his possession for delivery only upon the performance according to law of certain conditions precedent, to wit: that the petitioner, his assignee, or other holder, should first surrender to the register of the land office the original duplicate receiver's receipt, or in case that the same had been lost and could not be produced, then that he should make proof of that fact to the satisfaction of the said register of the land office at Salt Lake City, which, as a matter of fact, the said petitioner never did; and, as this respondent is informed and believes, the petitioner never made a demand for the delivery of the said patent, nor performed nor tendered a performance of the said conditions precedent, and that while the patent thus remained in the custody of the General Land Office, its officers and agents, and before the performance or tender of performance of the said conditions precedent, the discovery was made, as here-

inbefore stated, that the said patent had been illegally executed, recorded and transmitted; and this respondent further alleges and says that if this honorable court should issue the mandamus as prayed for, this respondent would be commanded to do an act which by law he is forbidden to perform, and to grant and deliver to the petitioner a patent which he has no right to receive; and that the thing when done, and the patent when delivered, would be utterly invalid and illegal; and it would require a delivery of a paper by this respondent in whose custody the paper is not now, and has not been, as hereinbefore stated; and it would require also this respondent to do an act discretionary in its character, and requiring the exercise in the highest degree of both discretion and judgment; and would further require him to act against his judgment, and in violation of the decision which he has already conscientiously made in that behalf; and such decision would involve on the part of this honorable court not only a review but a reversal of the judgment already rendered by this respondent, in a matter which by law is entrusted to his exclusive final decision.

Sixth. And this respondent, further answering, says that other parties besides the said McBride have or claim to have interest in the land claimed by him in his said petition, which they are now seeking to protect in the Land Department of the United States under the public land laws; and that the said parties are not now before this honorable court and cannot be in this proceeding; and your respondent ought not to be required and cannot legally be required to prejudice their interest without their first having an opportunity to be heard in that behalf; which said parties are now prosecuting their said claim for entry of the lands in question under the town-site laws, so called; that this respondent has jurisdiction over such claim, and is by law required to decide, if appeal be made, whether or not the same can be allowed; and that by the delivery of the said patent his jurisdiction in the matter would be ousted without proper, ordinary or legal decision upon the question of their rights.

Seventh. This respondent having already fully answered all and singular the several matters in the original petition set out, he is advised that it is not incumbent upon him to make any further answer to the several matters in the amended petition contained; but he does deny, as he has hereinbefore denied, that he has done any act or taken any action whatever in relation to any of the matters in the original and amended petition contained, since the date of his said decision upon said motion for a rehearing, and the transmission of his decision on that subject; and this respondent humbly prays that the said order heretofore entered in this cause may be discharged, and that he may be dismissed with his reasonable costs most unjustly incurred.

C. SCHURZ,
Secretary of the Department of the Interior.

H. H. WELLS,
Of Counsel for the Respondent.
U. J. BAXTER,
Of Counsel.

34 EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 7, 1879.

REGISTER AND RECEIVER,
Salt Lake City, Utah:

GENTLEMEN: This office has examined the case of the city of Grantsville vs. Thomas McBride, involving S. ½ of N. E. ¼, and lots 1 and 2, section 6, T. 3 S., R. 5 W.

McBride made homestead entry No. 381 for said tract May 31, 1869. Final certificate issued June 15, 1874. Patent was issued by this office on the entry of McBride September 26, 1877, but has not been delivered.

The tract in question is within the corporate limits of the city of Grantsville as established by the act of the legislature of Utah Territory, approved January 12, 1867.

After the patent had issued this office received a letter from the
35 local officers, inclosing an affidavit of W. R. Judd, mayor of Grantsville, setting forth that the city was entitled to an entry under the town-site laws; that the land claimed by McBride had been settled upon and used for municipal purposes, and that he desired to make an entry for the several use and benefit of the occupants thereof. He therefore requested that a hearing might be had before the local officers. Hearing was ordered by my letter of December 20, 1877.

From the testimony taken at the hearing it appears that Grantsville is composed of an agricultural community. That within the corporate limits thereof there are over 1,000 inhabitants, nearly all of whom are farmers or gardeners. By order of the city council and mayor of Grantsville the town was surveyed and divided into blocks and lots, and a plat thereof made by the countys urveyor of Tooele County in August, 1868. McBride's house is represented to be located upon lot 1, block 38.

These lots generally contain five acres each, and are bought and sold according to the description laid down on the city plat.

36 In the business portion of the town there is a public hall, the co-operative store, two blacksmith shops, and a private schoolhouse.

There is no question but that the streets opened through the claim of McBride had been used as roads for years before the incorporation of the town, for the accommodation of the farmers who cultivated the adjoining lands. So also in regard to the irrigating ditch referred to in the testimony as a municipal improvement, which was provided for the benefit of the farmers prior to 1860.

At the time McBride made his homestead entry, I do not understand that there were any municipal improvements on the land claimed by him, nor was there any adverse occupation thereof by actual residents. At that date, however, this entry was illegal under the acts of 4th September, 1841, and 20th May, 1862, as the lands entered were within the limits of an incorporated town. Before the approval of the act of
37 March 3, 1877, confirming certain entries within such limits, several families were actually living on the land, and quite a number of the inhabitants of the town had adverse possession of different lots for gardening purposes. In fact McBride has not had possession of more than 15 acres of the land included in his entry, the remainder of the tract being inclosed and in the possession of others.

These people came lawfully in possession of the lots, and as early as

the 24th February, 1877, William R. Judd, as mayor of Grantsville, filed an affidavit in the local office asking that the entry of McBride might be cancelled, as the land embraced therein was within the incorporate limits of the town, and citizens of Grantsville were residing thereon.

This may be considered as a notice by said town of its desire to appropriate said tract under the town-site laws, and that at a time when the entry of McBride was clearly illegal.

38 In view of these facts I do not feel called upon to discuss the provisions of the act of Congress approved March 3, 1877, in connection with this case. As before stated, the entry was illegal when made, and prior to the passage of this act the land had been surveyed and platted into lots and blocks, and actually occupied by residents and others in conformity to the subdivisions thus established. They were then and are now entitled to have an entry made for their several use and benefit.

The only provision of the town-site law of 1867, section 2387 et seq., Revised Statutes, limiting the time within which an entry thereunder shall be made, is that same or a declaratory statement "shall be filed with the register of the proper land office prior to the commencement of the public sale of the body of land in which it is included."

In regard to the power of this office to recall and cancel a patent before the same has been delivered to and accepted by the patentee, see the decision of the honorable Secretary of the Interior of Novem-

39 ber 16, 1878, in the case of Central Branch Union Pacific Railroad Company vs. Kansas Pacific Railroad Company, and the authorities therein cited. (Copp's Land Owner for January, 1879, p. 148.)

For the reasons herein stated, the entry and patent issued thereon, of McBride, for tract in question, is held for cancellation.

Notify parties in interest accordingly and report action in accordance with rules of practice.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

40 EXHIBIT B.

Before the honorable Secretary of the Interior, Washington, D. C.

IN THE MATTER OF CONTEST OF THE CITY OF Grantsville, Tooele County, Utah Territory, *vs.* THOMAS MCBRIDE, INVOLVING THE S. ½ N. E. ¼, and lots 1 and 2 in section 6, T'p 3 S., R. 5 W, Salt Lake meridian.	On appeal.

SALT LAKE CITY, UTAH,
April 8, 1879.

To the honorable SECRETARY OF THE INTERIOR,
Washington, D. C.:

Thomas McBride, by his attorneys, Tilford and Hagan, of Salt Lake City, Utah, and J. H. Mandeville, of Washington, D. C., appeals from the decision of the honorable Commissioner of the General Land Office which was rendered under letter G, February 7, 1879, holding the homestead entry of appellant, No. 381, for the S. ½ N. E. ¼, and lots 1

41 and 2 in section 6, T'p 3 S., R. 5 W., for cancellation, and which decision reverses the joint opinion as given by the register and

receiver of the U. S. land office in Salt Lake City in said contest, and assigns as his reasons for his appeal, and makes the following specification of errors, from the said decision of the honorable Commissioner of the General Land Office, to wit:

1st. The decision is contrary to the preponderance of the evidence as shown in the record of the case.

2nd. The decision is contrary to the law in the case.

The commissioner erred—

1st. In deciding that when Thomas McBride made his homestead entry, No. 381, on the 31st of May, 1869, that said entry was an illegal, entry when made.

2d. In deciding that by reason of other parties besides appellant now holding possession of parts of appellant's homestead entry, such evidence should be in part cause of his decision, as the evidence of record in the case does not show that such parties were on the land by or
42 with the consent of the said appellant, but the evidence shows the reverse.

3rd. When he assigns as a reason for his decision that as early as the 24th of February, 1877, William R. Judd, as mayor of Grantsville, filed an affidavit in the local land office asking that the entry of Thomas McBride might be cancelled, as the land embraced in said entry was within the incorporated limits of the town, and citizens of Grantsville were residing thereon, when the record in the case shows that McBride's homestead entry, No. 381, was made on May 31, 1869, and that he completed his entry June 15, 1874, in full compliance with the homestead laws.

4th. In citing the decision of the honorable Secretary of the Interior, dated November 16, 1878, in the case of Central Branch of the Union Pacific Railroad vs. Kansas Pacific Railroad Company, and the authorities therein cited (Copp's Land Owner for January, 1879, p. 148) as to
43 the power of this (the General Land) office to recall and cancel a patent before the same has been delivered and accepted by the patentee as being analogous to the case in question, as said decision quoted by the Commissioner is only in matters where, upon failure of acceptance of the patent, the patent is under the jurisdiction of the department and may be cancelled.

5th. In recalling the patent issued to appellant after the same had been signed and sealed and recorded and sent for delivery to the local land office, and which was demanded by the said appellant, and more particularly when said homestead entry had been lawfully completed when said McBride made his final proof in June, 1874, and patent would have already issued in 1874 except being withheld for the reason of a non-mineral affidavit not being found with the final papers.

6th. In citing the law of March 3, 1877, respecting the limits of reservations for townsites upon the public domain, as said law was enacted when nearly three years had expired after appellant had
44 made his final proof on his homestead entry, the land in contest.

7th. In basing his decision on the fact that the city of Grantsville had laid out part of McBride's homestead entry in blocks and lots, as that, if done at all, was not done in conformity with section 2382 of the Revised Statutes of the United States.

8th. In basing his decision on the fact that the tracts now in question are within the incorporated limits of the city of Grantsville, as established by the act of the legislature of Utah Territory, approved January 12, 1867, as the records in the case show that McBride made set-

tlement on the tract in contest in 1862, prior to the passage of the act of the legislature of Utah incorporating Grantsville, and appellant could not make a legal entry for the tract in question until the U. S. plats were filed and the U. S. land office for Utah Territory opened, which was in March, 1809; and the record shows that as early as
45 May, 1869, appellant made his homestead entry for the tract in question.

J. H. MANDEVILLE AND
TILFORD & HAGAN,
Attorneys for Appellant.

46 EXHIBIT C.

DEPARTMENT OF THE INTERIOR,
Washington, Oct. 1, 1879.

SIR: I have considered the case of the city of Grantsville vs. Thomas McBride, involving the S.^{2} of N. E. ^{4}, and lots 1 and 2 of section 6, town. 3 S. range 5 W. Salt Lake City, Utah Territory, an appeal from your decision of February 7, 1879, holding the homestead entry of McBride upon said tract for cancellation.

The city of Grantsville was incorporated by the act of the Territorial legislature of Utah January 12, 1867, embracing a large tract of land within its limits. Counsel for appellant claim that the act of the Territorial legislature was invalid, because it reserved from disposal under the land laws a large portion of the public domain.

I cannot concur in this view.

Congress did not declare the acts of the legislature creating
47 large corporations invalid until March 3, 1877, when it passed an act limiting the quantity of land to be included within the limits of a corporation to the maximum area which may be entered as a town site under existing laws. It follows, that at the date of McBride's entry, May 31, 1869, the land was not subject to appropriation by him, as it was within the limits of an incorporated town.

The second section of the act of March 3, 1877, confirms certain entries. Its terms are as follows:

"SEC. 2. That where entries have been heretofore allowed upon lands afterward ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown to the satisfaction of the Commissioner of the General Land Office to include only vacant unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects, are hereby confirmed and may
48 be carried into patent: Provided, That this confirmation shall not operate to restrict the entry of any town-site to a smaller area than the maximum quantity of land which, by reason of present population, it may be entitled to enter under section twenty-three hundred and eighty-nine of the Revised Statutes."

Was the entry of McBride thus confirmed?

At its date McBride knew that the tract in question was within the corporate limits of the town; a year previous to that date he had recognized the authority of the town officers by leasing, or purchasing a portion of said tract from them. It cannot therefore be said that the land entered was afterwards ascertained to have been embraced in the corporate limits of any town.

I am of the opinion that the confirmatory act was for the benefit only of parties who had made entries in good faith upon lands not known at

the date of said entries to be within the corporate limits of a town. It has not been shown that at the date of said entry, nor of the passage of
49 the confirmatory act, the entry in question included only vacant, unoccupied lands of the United States, not settled upon or used for municipal purposes. On the contrary, it appears that a year prior to the date of entry, the tract was surveyed and platted into town lots and blocks, and was subject to disposal by the town authorities; that for years prior to the passage of the act of 1877 the town authorities had sold such lots, and that various parties were residing and had been for some time residing upon different lots, and cultivating and improving the same. Of the tract claimed only about 15 acres are or have been in the actual possession of McBride, and he resides upon said lot.

It is no doubt true that the actual value of municipal improvements upon the land in dispute is very small, but the law fixes no standard of valuation for such improvements. The tract in dispute at the date of the passage of the confirmatory act was under the control of the
50 municipal authorities. Various parties were improving and cultivating the same under authority derived from said officers, and others had settled upon the land and were residing thereon.

In view of all the facts in the case I am of the opinion that the entry of McBride was not confirmed by the second section of the act of March 3, 1877. His settlement prior to the date of his homestead entry cannot be recognized as conferring upon him any rights under the homestead law.

It appears that a patent for the land in question was prepared and executed to McBride September 26, 1877, but has never been delivered, and is now within the control of your office. It is argued by counsel for appellant that by means of said patent the title of the United States to the land has been transferred to McBride, and that this department has no further jurisdiction in the case. I cannot concur in this view.

The patent was erroneously executed according to the finding
51 of the officers of the Land Department. To deliver it would be to consummate what at its inception was an error and mistake.

In the decision of the case of the Central Branch Union Pacific Railroad Company vs. The Kansas Pacific Railroad Company (Copp's Land Owner, vol. 5, p. 148), it was held, after a citation of authorities bearing upon the subject, that delivery to and acceptance by the grantee of a patent were essential to the transfer of title; and further, that while the patent was undelivered and still under the control of the head of the Land Department, the same could be canceled if, upon investigation, it was found that such action was demanded by the public interests and a due regard for the proper execution of the laws. I see no good reason why the views then expressed should be changed; on the contrary, a further examination of the authorities satisfies me that the conclusions then reached are correct.

Your decision is therefore affirmed.

52 In this connection your attention is called to the provisions of section three of the act of March 3, 1877, above cited, and you are hereby instructed to take immediate action to carry the same into effect.

The papers in the case are herewith transmitted.

Very respectfully,

A. BELL,
Acting Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

53 EXHIBIT D.

Motion to set aside the judgment and to grant a new trial.

Before the honorable the Secretary of the Interior, October 4, 1879.

THE CITY OF GRANTSVILLE
vs.
THOMAS MCBRIDE, APPELLANT.

And now comes Thomas McBride, and moves the honorable the Secretary of the Interior to set aside his decision herein made on the 1st day of October, 1879, and to grant a new trial and rehear the case for the following reasons:

1st. The said decision is against the evidence in the case.

2nd. It is against the law of the case.

3rd. There was error in holding that the right of McBride did
54 not accrue until the date of his homestead entry.

4th. There was error in holding that the patent to McBride could be recalled and cancelled.

5th. There was error in holding that the Territorial legislature of Utah had authority to incorporate the said city of Grantsville.

6th. There was error in allowing the said city to contest this case.

7th. There was error in allowing the said city of Grantsville to contest this case, it not having made selection of the land claimed for a town-site patent prior to the entry of McBride in 1874.

8th. There was error in holding that McBride's entry was not saved by the act of Congress of March 3, 1877.

9th. There was error in not holding that McBride's entry was saved by said act of March 3, 1877.

10th. There was error in not awarding the land to McBride.

55 Wherefore, he prays that the said decision may be set aside and a new trial granted.

JAMES H. MANDEVILLE,
W. H. SMITH,
Counsel for Appellant.

56 DEPARTMENT OF THE INTERIOR,
Washington, Oct. 8, 1879.

SIR: I am in receipt of an application by counsel for Thomas McBride for a review of the departmental decision of the 1st instant, in the case of The City of Grantsville vs. said McBride.

It is alleged that error existed in the conclusions reached in said decision, and in support of the application the same points and arguments with some elaboration are presented which were before the department in the first instance.

It is alleged that there was error in not holding that the act of the legislature of Utah, including within the corporate limits of Grantsville an area of land greater than the law permits to be taken as a town-site, was an interference with the primary disposal of the public land, and
was therefore in violation of the 6th section of the act of Congress
57 organizing the Territory of Utah. (9 Statutes, 453.)

The city of Grantsville was incorporated by the Territorial legislature January 12, 1867. The homestead entry of McBride was made May 31, 1869, under the provisions of the act of Congress approved

May 20, 1862, which permits a tract of land subject to pre-emption to be entered as a homestead.

By law the greater portion of the public lands of the United States are subject to pre-emption. Certain portions are not thus subject to disposal, among which are "lands included within the limits of any incorporated town or selected as the site of a city or town." (Section 2258, R. S.)

It follows that if the tract in dispute was within the incorporated limits of Grantsville, it was not subject to the homestead entry of McBride, and the same was invalid.

The power of States and Territories to incorporate cities and
58 towns located on the public lands has never been denied. "It has always been exercised by them exclusively of the Federal Government. Indeed, the legislation of Congress concedes the power." (1 Woolworth C. C. Reports, 359.)

In the organic act establishing the Territory of Nebraska, the same words of limitation of power, as to the disposal of public land, are used as in the 6th section of the act before cited. In the case cited, in discussing this clause, the court say:

"The clause in the original act was intended to forbid the Territorial legislature passing any law to dispose of the public lands as if on its own authority, or intermeddling with the mode by which the general government should dispose of them, or assuming any authority or jurisdiction in respect to that business. It was not intended to deny authority to pass a law which the Territory alone could intelligently enact."

The 6th section of the organic act of Utah provides that all the
59 acts of the legislature and governor shall be submitted to Congress, and, if disapproved, "shall be null and of no effect."

A Territorial government is a creature of Congress; hence, in creating such a government, that body could properly retain in itself the power to annul an act of its legislature. On this point the Supreme Court of the United States say: "It seems to us that the control of these Territorial governments properly appertains to that branch of the government which creates and can change or modify them to meet its views of public policy, viz, the Congress of the United States;" and again, "Congress, in creating the Territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers until expressly sanctioned by themselves; whilst for considera-
tions equally strong they reserved the power of disapproving or
60 annulling such acts of Territorial legislation as might be deemed detrimental." (Miner's Bank vs. State of Iowa, 12 How., p. 1.)

This department is not created a tribunal to pass upon the validity of the act of a Territorial legislature. That power is reserved to Congress. The act incorporating Grantsville was passed by the Territorial legislature in accordance with the power conferred by Congress, and must be considered in force until the same power pronounce it invalid and of no effect. It does not follow from this that all the land embraced within the limits of a corporation can be entered as a town site under the laws of the United States. The act of incorporation neither abrogates nor enlarges the town-site act; it simply creates a corporation including certain lands; but as Mr. Justice Miller so clearly states, in the case of
1 Woolworth, above cited, such incorporation cannot be consid-
61 ered an interference with the primary disposal of the public lands.

I do not think there was error in holding that the entry of McBride

was invalid for the reason that it was made upon land included within the limits of an incoporated town.

It is urged by counsel that McBride was protected by his settlement made prior to the act of incorporation. It is a well established principle that no right under the homestead law can be initiated by settlement prior to date of actual entry, except a right which may have accrued under the pre-emption law. He however asserts no claim under the pre-emption law. A mere settlement would give him no right in the absence of proper qualifications, and an intention to claim under that law, and a compliance with the requirements of the statute necessary to protect and perfect his claim. (Weber vs. Western Pacific Railroad Company, Copp's Land Owner for May, 1879; Blogett vs. Cali-
62 fornia & Oregon Railroad Company, Ib. for June, 1879; Sarano vs. Southern Pacific Railroad Company, Ib. for September, 1879.)

He has shown no such compliance. Had he asserted a claim under the pre-emption law, other questions would have been presented which it is not necessary nor legitimate to consider in the case now before me. He elected under which law he would claim, and his rights must be determined under that law.

I will not discuss the question of the effect of the patent erroneously prepared further than to reaffirm the position of this department, which, in my opinion, is clearly founded upon the decisions of the supreme court, that "when a patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title, or to decide on the right to the title, has passed from the land office. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, gen-
63 erally called a patent, has been signed by the President and sealed and delivered to and accepted by the grantee." (6 Otto, 530.)

The erroneous preparation of a patent does not transfer the title of the United States in lands to one not entitled thereto. Where one is illegally claiming land, he can only obtain a title to the same by the delivery to and acceptance by him of the patent. When that is done, and only then, will this department relinquish its right to protect the interest of the government against an illegal claimant of the public domain.

It is claimed that the tract in dispute cannot be entered as a part of the town-site of Grantsville. That question is not now before me. When an application for a patent is presented by the proper authorities of the town, it must be determined upon its merits, according to the law in the case. Should the tract in question be excluded, the present action of the department will in no wise prejudice the right of Mc-
64 Bride to obtain, under the laws of the United States, title to the legal subdivision upon which his improvements are placed and which has been in his possession. But he should not be permitted to appropriate the property of others.

You are instructed to at once call upon the town authorities to make their selection, and should they fail to do so within the time provided by law, you will proceed as directed in the 3d section of the act of March 3, 1877.

The application to modify and recall the departmental decision of the 1st instant, is denied.

Very respectfully,

C. SCHURZ,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

65 EXHIBIT E.

Council met September 14, 1868.

* * * * * * *

Motion that Thomas McBride have lot 1, block 38 for 15 dollars. Carried.

* * * * * * *

UTAH TERRITORY,
Recorder's Office, Grantsville City, ss:

I, Emanuel Bagley, recorder of Grantsville City, do hereby certify that the foregoing is a correct abstract of that certain business transaction of the city council of said city, and contained in the minutes of the meeting of the 14th day of September, A. D. 1868, as appears from the city records, in book A on page 26.

Witness my hand and the seal of said city, this 21st day of January, A. D. 1878.

[L. S.] EMANUEL BAGLEY,
City Recorder.

66 TERRITORY OF UTAH,
Tooele County, Grantsville City, ss:

JANUARY 21ST, A. D. 1878.

To the honorable the Land Commissioner, Washington, D. C.:

We whose names are hereunto attached set forth, that we are actual settlers upon, and owners of, several parcels of land embraced within the tracts of land upon which one Thomas McBride has made homestead entry (which entry is now contested by the city authorities of Grantsville City). That the said tracts of land filed upon by the said Thomas McBride are within the corporate limits of said city; that the parcels of land upon which we are living were surveyed into city lots by said city authorities, during the month of July, A. D. 1868, about one
67 year previous to the time of said Thomas McBride's first filing on the land. That he (Thomas McBride) in common with us, is also a purchaser of land surveyed by the said city authorities, and above mentioned, as will be seen by reference to the records of Grantsville City.

Business meeting of the city council of said city, September 14th, A. D. 1868. Book A, page 26th.

Motion: That Thomas McBride have lot 1, in block 38, for 15 dollars. Motion carried.

That the said lot 1, in block 38, above referred to, is the lot upon which said Thomas McBride has since erected a house and now lives; that after purchasing said lot he (Thomas McBride) made his homestead filing, as will be seen by reference to papers and dates. We make this showing to satisfy you of the fact, that the city of Grantsville had
68 the land in question surveyed about one year previous to the time of Thomas McBride's filing.

That we have built houses, made fences, and otherwise improved our lands, paid taxes upon and expended a considerable amount of means, making ditches to convey water to the same. That we have quietly and peaceably remained in possession of our said possessions for many years, save the repeated declarations of Thomas McBride's, that he would not give deeds to individuals having claims upon lots situated

on his entry. That in the event he should succeed in verifying his declarations we would be deprived of our lands, and our families left without homes.

As we are, generally speaking, men of very limited means, we are unable to defend our cause at law, and must, therefore, rely upon your rulings in this matter, to secure unto us our just rights.

We would here say, while we do not desire that our neighbor Thomas McBride should be dispossessed of his individual home (which
69 we feel assured he will not), we are aware of this fact, that he is to a great degree destitute of the same amount of interest for our welfare. Therefore in order justly and lawfully to secure unto ourselves and our neighbors that which is the reward of many years industrious toil, and that Thomas McBride may have that which and no more than is justly his, we respectfully ask and sincerely pray, that your ruling on the case, upon which this instrument has bearing, will be in favor of the city of Grantsville, firmly believing as we do that in that case, and in no other, will all parties receive their just rights.

John Edgennel.	Alfred Elison.
Claus Anderson.	A. Gustave Nygren.
Andrew Enlison.	Arvet L. Hale.
Leater Peaterson.	John Samulson.
Gust. Samulson.	Charles McMurray.
Charles Bailey.	Paul M. Barnes.
James Ratcliffe.	Samuel Martin.
John T. Rich.	Wm. Burles.
John W. Clock.	John Eastman.
70 James Weathel.	Charles Burton.
William R. Judd, jr.	

Charles McMurray and Charles W. Bailey, being first duly sworn, on oath depose and say, each for himself and not one for the other, that all of the names signed to the above letter was done by the parties themselves having interest in the land.

CHARLES McMURRAY.
CHARLES W. BAILEY.

Subscribed and sworn to before me this 23d day of January, A. D. 1878.

MOSES M. BANE, *Receiver.*

(Endorsed:) At law. No. 21200. Thomas McBride vs. Carl Schurz. Answer of Carl Schurz to application for writ of mandamus.

The clerk will please file.

H. H. WELLS,
Attorney for Schurz.

Filed Oct. 24, 1879.

R. J. MEIGS, *Clerk.*

71 *Joinder in issue.*

In the supreme court of the District of Columbia, this 27th day of October, 1879.

THE UNITED STATES, EX RELATIONE THOMAS McBRIDE,
vs.
CARL SCHURZ, SECRETARY OF THE DEPARTMENT of the Interior. } At law. No. 21200.

1. And now comes the said relator and says that he joins issue upon the defense first plead in the answer of the said respondent.

2. The said relator joins issue upon the second defense set forth in the answer of the said respondent.

3. The said relator joins issue upon the third defense set forth in the answer of the said respondent.

4. The said relator joins issue upon the fourth defense set forth in the answer of the said respondent.

72 5. The said relator joins issue upon the fifth defense set forth in the answer of the said respondent.

6. The said relator joins issue upon the sixth defense set forth in the answer of the said respondent.

7. The said relator joins issue upon the seventh defense set forth in the answer of the said respondent.

WALTER H. SMITH,
JAMES H. MANDEVILLE,
Counsel for Relator.

(Endorsed:) No. 21200. At law. The United States, ex rel. Thomas McBride, vs. Carl Schurz, Secretary of the Department of the Interior. Joinder in issue. Walter H. Smith, James H. Mandeville, counsel for relator. Filed Oct. 28th, 1879. R. J. Meigs, clerk.

73 In the supreme court of the District of Columbia, this 28th day of October, 1879.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Wylie, Cox, and James.

THE UNITED STATES, EX RELATIONE Thomas McBride, *versus* CARL SCHURZ, SECRETARY OF THE Department of the Interior. } At law. No. 21200. Mandamus.

Argued by Mr. Mandeville and Mr. W. H. Smith for the relator, and Mr. District Attorney Wells for the Secretary, and submitted to the court.

Adjourned till ten o'clock to-morrow morning.

74 *Judgment.*

In the supreme court of the District of Columbia, this 10th day of November, 1879.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Wylie, Cox, and James.

* * * * * * *

THE UNITED STATES, EX RELATIONE Thomas McBride, *versus* CARL SCHURZ, SECRETARY OF THE Department of the Interior. } At law. No. 21200. Mandamus.

And now again come here as well the relator as the defendant, by their respective attorneys; whereupon, after argument of the rule aforesaid, it is considered by the court that the said rule be, and the same is

hereby, discharged, and that the defendant recover against the relator the costs of the cause, to be taxed by the clerk, and have execution thereof.

75 *Agreed statement of counsel.*

In the supreme court of the District of Columbia, this 14th day of November, 1879.

THE UNITED STATES, EX RELATIONE Thomas McBride, *vs.* CARL SCHURZ, SECRETARY OF THE Department of the Interior. } At law. No. 21200.

Be it remembered that on the hearing of this cause before the supreme court of the District of Columbia, sitting in general term, on the 28th day of October, 1879, it was conceded by both parties that all the allegations of the original petition were true, except the one that the premises named in the petition were in 1862 subject to preemption filing or homestead entry.

It was also conceded that the case relating to said premises, set out in the answer of respondent, had been appealed from the decision
76 of the Commissioner of the General Land Office to the Secretary of the Interior, and was pending before the said Secretary at the time of the demand for said patent was made on him, as set forth in the said original petition of relator, and for some days thereafter, and that at the time of said demand, and for some days thereafter, the said patent was, with the papers in said case, as an exhibit in said case, in the office of the Secretary of the Interior, and was not in the office of the Commissioner of the General Land Office.

It was also conceded that the incorporated town of Grantsville, set forth in the answer of the respondent, was in fact the incorporated city of Grantsville, and that it was incorporated by the Territorial legislature of Utah on the 12th day of January, 1867, and that said act should be treated as referred to and made a part of this case.

All other matters in said case stood upon the original and supplemental petition, the answer of respondent, and the replication thereto.
77 There was no other or further proof or evidence offered by either party.

One of the rules of this court is as follows:

"33. The joinder in issue may be—

"'The plaintiff joins issue upon the defendant's first plea.

"'The defendant joins issue upon the plaintiff's replication to the first plea.'

"And this form of joinder shall be deemed to be a denial of the substance of the pleading to which it relates, and an issue thereon."

And thereupon the said court, upon the 10th day of November, 1879, upon the evidence and pleading aforesaid, gave judgment for the said respondent.

The foregoing facts are stipulated to be a full and true statement of this case, and made part of the record therein.

Nov. 14, 1879.

W. H. SMITH,
Att'y for Pl'ff.
U. J. BAXTER,
Of Counsel for Respondent.

Whereupon the court orders the said stipulation to be made of record in the case. * * * * *

78 (Endorsed:) 21200. At law. The United States, ex relatione Thomas McBride, versus Carl Schurz, Secretary of the Department of the Interior. Agreed statement of counsel. Filed Nov. 14, 1879. R. J. Meigs, clerk.

79 *Authentication of record.*

In the supreme court of the District of Columbia.

THE UNITED STATES, EX RELATIONE THOMAS McBRIDE, *versus* CARL SCHURZ, SECRETARY OF THE DEPARTMENT of the Interior.	At law. No. 21200. Mandamus.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 20th day of November, 1879.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't C.*

(Indorsement on cover:) No. 707. The U. States, ex rel. Thomas McBride, plaintiff in error, vs. Carl Schurz, Secretary of the Interior. Dist. of Columbia sup. court. Filed 21st November, 1879.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 12th, 1880.

SUPREME COURT U.S.
FILED
OCT 4 1880
JAMES H. MCKENNEY, CLERK

THE UNITED STATES, *ex relatione*
THOMAS McBRIDE,
Plaintiff in Error,
versus
CARL SCHURZ, Secretary of the Department of the Interior.

No. 707.
In error to the Supreme Court of the District of Columbia.

ARGUMENT OF

MR. JAMES H. MANDEVILLE,

Counsel for Thomas McBride.

INVOLVING—

1st: The power of an executive officer of the Government to recall and cancel a patent.

2d: The power of a Territorial Legislature to incorporate cities upon the public lands of the United States.

WASHINGTON:
R. BERESFORD, PRINTER, 523 SEVENTH STREET.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES

October 12th, 1880.

THE UNITED STATES, *ex relatione*
THOMAS McBRIDE,
Plaintiff in Error,
versus
CARL SCHURZ, Secretary of the Department of the Interior.

No. 707.
In error to the Supreme Court of the District of Columbia.

ARGUMENT OF

Mr. James H. Mandeville,

Counsel for Thomas McBride.

ERROR.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA ERRED IN DENYING THE PETITION OF THOMAS McBRIDE FOR A WRIT OF MANDAMUS, TO COMPEL CARL SCHURZ, SECRETARY OF THE INTERIOR, TO RESTORE AND THEN TO DELIVER TO SAID PETITIONER THE HOMESTEAD PATENT ISSUED TO HIM ON SEPTEMBER 26TH, 1877, BUT WHICH WAS CANCELED BY ORDER OF SAID SECRETARY, OCTOBER 10, 1879.

MAY IT PLEASE YOUR HONORS:

As counsel exhausted the law upon the questions discussed before the Secretary of the Interior, and has nothing further of a legal nature to offer to this Court of last resort, he begs your Honors to accept as his argument here the same argument which he made in the first instance.

James H. Mandeville

Counsel for Plaintiff in Error.

46TH CONGRESS, 2d Session. } SENATE. { Ex. DOC. No. 181.

THE CITY OF GRANTSVILLE, UTAH, vs. THOMAS McBRIDE.

ARGUMENT

OF

MR. JAMES H. MANDEVILLE

BEFORE

HON. CARL SCHURZ,

SECRETARY OF THE INTERIOR.

Questions discussed:

1st. The power of an executive officer of the government to recall and cancel a patent.

2d. The power of a Territorial Legislature to incorporate cities upon the public lands of the United States.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1880.

ADDENDA.

October 11, 1879.—McBride filed in the supreme court of the District of Columbia, his petition against Carl Schurz, Secretary of the Interior, praying for a writ of mandamus to compel the Secretary to restore and then to deliver the canceled homestead patent.

November 10.—Petition dismissed.

November 21.—Writ of error docketed as case No. 1080 in the Supreme Court of the United States.

December 8.—Motion to advance.

December 15.—Motion denied.

January 20, 1880.—Application to the President of the United States for an Executive order directing the Attorney-General to move for an advance.

February 2.—Another motion to advance; orally concurred in by the Attorney-General.

February 5.—Resolution of inquiry offered by Hon. John Van Voorhis in the House of Representatives, directing the Secretary of the Interior to report by what authority he canceled the patent of McBride.

March 15.—Case advanced and set for trial October 12, or the first case to be heard at the opening of the court for October term, 1880.

March 22.—Resolution of inquiry offered by Hon. George F. Edmunds in the United States Senate; same purport as the House resolution. (S. Exec. Doc. 181.)

March 23.—Petition of McBride to the Senate praying for a confirmation of his title. (Senate Mis. Doc. No. 67.)

April 28.—Bill reported to the House of Representatievs by Hon. H. L. Muldrow, No. 6021, recommending, not a confirmation of title, but a law to perpetuate the mandamus suit of McBride in the United States Supreme Court. (House Report No. 1313.)

Before the honorable Carl Schurz, Secretary of the Interior, June 10th, 1879.

THE CITY OF GRANTSVILLE, IN THE TERRITORY OF UTAH,
vs.
THOMAS MCBRIDE, APPELLANT.

From the land office at Salt Lake City, Utah.

ARGUMENT OF MR. JAMES H. MANDEVILLE, OF COUNSEL FOR APPELLANT.

STATEMENT OF THE CASE.

This is a proceeding to cancel and vacate a homestead patent, upon the ground that it lies within the limits of an incorporated city. The so-called city of Grantsville was incorporated January 12, 1867, by an act of the Territorial legislature of Utah. Its corporate limits were made 4½ miles square. There are 21 sections of land, or nearly 14,400 acres, within its chartered area. Its population was 457 in 1860. In the 9th census, for 1870, its population is given as 755 souls. So it then could have acquired a town site patent for only 640 acres of land. Thomas McBride settled on his land in 1862. It lies within the corporation, but nearly a mile from the town. He entered his homestead on May 31, 1869, cultivated about 15 acres, and made the usual improvements of a farmer to the amount of $1,000; and on June 15, 1874, he received a certificate entitling him to a patent.

After a delay of *three years* the commissioner of the land office issued a patent to McBride September 26, 1877, when it was sent for delivery through the register at Salt Lake City.

The mayor of Grantsville then made an affidavit (October 25, 1877) that this homestead is within city limits, and contains valuable municipal improvements. So the register withheld the patent and sent the affidavit to the commissioner, who ordered a hearing December 20, 1877, so as to ascertain when such municipal improvements were made, their character, extent, and value. He also recalled the patent, and has now ordered it to be canceled.

On February 7, 1879, the Commissioner found:

1st. That Grantsville is an agricultural community of over 1,000 people, *nearly all of whom are farmers* or *gardeners*.

2d. That its municipal authorities had the town surveyed into blocks, and then into lots of 5 acres each, in August, 1868, and that titles to these lots emanated from such authorities.

3d. That its business portion consists of a public hall, the co-operative store, two blacksmith shops, and a private school-house.

4. That the irrigating ditch upon the homestead and the roads extending through it existed many years before the incorporation of the town.

5. *That when the homestead was entered* (1869) *there were no municipal improvements upon it, nor any adverse occupation thereof by actual residents*, although before approval of the act of Congress of March 3, 1877, several families were living upon the homestead, and quite a number had adverse possession of different lots upon it.

6. That McBride has not had possession of over 15 acres of the land included in his entry, the balance being enclosed and in possession of others, who came lawfully thereby.

7. That the mayor of Grantsville applied to have the homestead entry canceled as early as February 24, 1877, which may be considered as a notice of its desire to "appropriate" the land of McBride under the town-site act of 1867.

The Commissioner, after finding all material facts in favor of McBride, proceeded to hold his patent for cancellation, upon the ground that under the acts of Congress of 1841 and 1862 no land could be entered as a homestead within the limits of an incorporated city. Sec. 10, act of Congress of September 4, 1841, 5 Stats. at Large, 456. (R. S., 2258.) Sec. 1, act of Congress of May 20, 1862, 12 Stats. at Large, 392. (R. S. 2289.)

ARGUMENT.

This appeal can be safely rested upon two grounds:

I.

The Commissioner erred in recalling the patent. McBride's rights became vested upon the signing, sealing, recording of the patent, and his acceptance of the same. Delivery of the patent was not essential to vest any rights in him. The Commissioner may cancel an entry, but he has no power to cancel a patent without the consent of its owner.

II.

The act of the Territorial legislature of Utah, incorporating the city of Grantsville, is contrary (1) to the organic act of Congress establishing the Territory; (2) to the acts of Congress permitting incorporations in the several Territories; and (3), to the town-site acts of Congress now in force.

But before this case is argued on its merits, the appellant calls attention to the practice of the Land Office as to hearings in contested cases. It is submitted that the Commissioner could have announced the law in this case on December 20, 1877. No hearing was necessary.

The legislature of Utah has incorporated 37 cities, with limits of from two to six miles square, and it withdrew the public lands of the United States so incorporated from the operation of the pre-emption and homestead laws, and placed them under control of municipal authorities who are no other than the representatives of the "Church of Jesus Christ of Latter Day Saints," commonly known as the Mormon Church.

There are over 44 entries of all kinds upon the chartered lands of this so-called city of Grantsville, and they cover about 7,160 acres—more than one-half of its incorporated area.

If the charter of Grantsville is valid, the charters of all the incorporated cities in Utah were also valid. But if its charter is invalid, then they were all invalid.

If McBride's entry is valid the whole 44 entries, unless upon land for which a town-site patent can issue, are also valid. But if his entry is void, then they are all void, unless confirmed by the act of Congress of March 3d, 1877.

And this proposition would be true as to any entries made in the 36 other incorporated cities in Utah, but Grantsville is the only one of them which has not applied for a town-site patent.

Upon this statement, supported as it is by the records of the land office and the history of the day, political and legislative, the Commissioner—with a show of plausibility quite equal to that of recalling a patent that had been sent for delivery to a homestead settler against whom there is no sustained imputation of bad faith or any want of diligence in prosecuting his rights to final issue—might have certified this case to your honor, and asked for instructions. In so doing, he would have had some respect for a settler in this unequal contest, for this is a case of a city against one man, who is not a desirable acquisition to that pious community.

The issuing of a patent after 3 years of delay (during which time it would seem that the Commissioner could have adjudicated a case in a manner satisfactory to himself), and then recalling it, will not strike some people as a very business-like administration of ministerial duties, inasmuch as since its recall he has issued patents for 800 acres of land lying within the incorporated limits of this same city of Grantsville.

The questions presented on this appeal are purely questions of law. They are independent of any facts which a hearing could evolve. The mass of testimony taken in this case is entirely immaterial. No hearing was necessary in order to arrive at a solution of this contest. If the law says that a settler shall *not* make a homestead within the limits of an incorporated city, and a homestead *is* made within such limits, the validity of an entry is a question for decision simply upon the record. With fulsome kindness the Commissioner found the material facts in favor of McBride in his 5th finding, and then ordered his patent to be cancelled because void at its inception.

The ordering of hearings lies within the discretion of the Commissioner, but unless this discretion is regulated there will be some more poor settlers who will have to pay, and pay dearly, for just such an exercise of discretion as this case presents.

The Commissioner erred in ordering a hearing in this case.

I.

Counsel now proceeds to discuss the power of an executive officer of the government to recall and cancel a patent.

The Commissioner erred in recalling the patent. McBride's rights became vested upon the signing, sealing, and recording of the patent, and his acceptance of the same.

Delivery of the patent was not essential to vest any rights in him. The Commissioner may cancel an entry, but he has no power to cancel a patent without the consent of its owner.

1. When the patent was signed, sealed, and recorded, and accepted by McBride, the title vested in him. A grant is authentic, and passes the interest of the State when the governor puts his signature and the seal of the State. Phillips' Lessee *vs.* Erwin, 1 Tenn. (1807), 235.

The Supreme Court held, in 1814, that the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage. (Green *vs.* Liter, 8 Cranch, 247.)

The supreme court of Maryland held, fifty years ago, that after the great seal has been once put to the patent then all further control over it ceases. Cunningham *vs.* Browning, 1 Bland (1827), 304.

Even a deed of trust accepted and put on record is sufficient. Steele *vs.* Lowry, 4 Ohio Rep. (1829), 72. A grant of land by the legislature vests an actual seizin in the grantee. The grant in such case is a public act, and this notoriety of the grant is, in contemplation of law, equivalent to an actual entry by the grantee. Proprietors of Enfield *vs.* Pennit, 8 N. H. (1837), 515.

The Supreme Court recently held that a proclamation of the President takes effect when signed by him, and sealed with the seal of the United States officially attested, and that a publication in a newspaper is not requisite to make it operative. Lapeyre *vs.* The United States, 17 Wall. (1872), 191.

Later decisions of the courts have held that a patent takes effect from the moment when it is signed, sealed, and recorded, as a patentee takes by matter of record. With the close of the record the power of the officers of the government over the instrument is gone. Le Roy *vs.* Clayton, 2 Sawyer (1874), 496; Le Roy *vs.* Jamison, 3 ib. (1875), 391.

2. The law will presume, if nothing appears to the contrary, that McBride accepted his patent. But the record shows that he has applied for it before and since the beginning of this contest. Of course he would accept it; it was issued for his benefit. Garnons *vs.* Knight, 5 Barn. & Cres. (King's Bench, 1826), 692.

The acceptance by the grantee of the conveyance will always be presumed whenever the conveyance is placed in a condition for acceptance. It is in a condition for acceptance when signed, sealed, and recorded. The acceptance of McBride was then to be conclusively presumed, unless immediately upon knowledge of its issue his refusal to accept it was explicitly declared, and such refusal was communicated to the land office. (Le Roy *vs.* Jamison, 3 Sawyer, 391.)

3. A delivery of McBride's patent is not necessary to its validity. Marbury *vs.* Madison, 1 Cranch (1803), 137.

No livery of seizin is necessary to perfect a title. Green *vs.* Liter, 8 ib., 247.

The court of King's Bench in the case we have cited said: "Whether a deed will operate as a deed, though it is never parted with by the person who executed it, there are many authorities to show that it will." 5 Barn. *v.* Cres., 689.

McBride's patent is but evidence of his title. It was not indispensably necessary to deliver it. The supreme court of Louisiana has said: "Many of these complete grants are not delivered for years, and in some instances never. Yet it was never doubted the government was divested of all title, and the patent irrevocable unless for fraud." Lavergne's Heirs *vs.* Elkins' Heirs, 17 La. (1841), 227.

The supreme court of Ohio held 25 years ago: "Patents for the public lands take effect as soon as issued, though they may never come to the grantee's hands, and were issued without any specific application for them." * * "The strictness of the ancient doctrine in respect to the delivery of deeds has gradually worn away, until a doctrine more consistent with reason and the habits of the present generation now prevails." Mitchell *vs.* Ryan, 3 Ohio State (1854), 387, 388.

The California judiciary has solidly taken the same position on these questions here considered by counsel, as has been uniformly taken by the courts of other States throughout the Union. California is the oldest of the Pacific States. Her admission as a State was upon the same day that Congress established the Territory of Utah, September 9, 1850. Her judiciary is largely followed by the highest courts of neighboring States and Territories beyond the Rocky Mountains. And upon many questions of public land law, from prevailing necessities, her courts were obliged to take positions far in advance of the courts in Eastern States where there are no public lands of the general government. For many years her courts have protested against the arbitrary acts of the land department in recalling and canceling patents. The doctrine of the supreme court of California is unanswerable, and the light of authority shining in the focus of its lens should burn the law into any mind that is capable of receiving law.

Delivery, as applied to private conveyances, has no application to grants made by the government, either under the Mexican system or our own. Title, under a grant, vests the moment it has received the stamp of the last act required to completely au-

thenticate the instrument, and delivery is unnecessary. Donner *vs.* Palmer, 31 Cal (1867), 514.

McBride's patent took effect upon its issue, and it is unnecessary to show a delivery to or an acceptance by him. Chipley *vs.* Farris, 45 Cal. (1873). 539.

A delivery in the case of a government patent is not necessary. The patentee takes by matter of record. Said the Supreme Court, in Marbury *vs.* Madison: "But in cases of all letters patent certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. *A formal delivery is not one of them.*" Le Roy *vs.* Clayton, 2 Sawyer, 497.

The delivery of a patent is not essential to its taking effect as a conveyance. Miller *vs.* Ellis, 51 Cal. (1875), 73.

Counsel has not found a decision by any court, State or Federal, which held that a patent must be delivered in order to vest a title.* With mistaken assurance, the land department has freshly asserted its right to control a patent until it has been delivered, upon the recent case of Moore *vs.* Robbins, which, it is claimed, has settled the law upon this disputed question of delivery by holding that title under a patent vests *only* when the patent "has been delivered to and accepted by the grantee." The Supreme Court said, it is admitted, that title vests when a patent has been so delivered and accepted; but it did not hold to the contrary, that want of delivery will prevent the vesting of title, because this question of delivery was not under consideration by the court. These are the facts: Moore had a contest with Bunn before a local land-office. Bunn prevailed, but the Commissioner, on appeal, reversed the decision of the local officers, and issued a patent to Moore. After the patent was delivered to Moore, Bunn appealed to the Secretary, who reversed the decision of the Commissioner, and directed that the patent to Moore be recalled and a patent issued to Bunn. Moore refused to return it, and the department did not venture to issue another patent for the same land. Upon that statement of facts, the Supreme Court decided that a legal title was vested in Moore, because the patent had been delivered to and accepted by the grantee. For the department to cite that case as its justification for the recall and cancellation of an undelivered patent is absurd. If Moore's patent had not been delivered and the court had held as it did there would then be some sense in its citation.

The order for the return of the patent of Moore, said the court, "was made without authority, and is utterly void." Moore *vs.* Robbins, 6 Otto (1877), 534.

4. The courts have uniformly held as harmful the practice of the department in the cancellation of patents without their owner's consent.

Counsel admits the right of the Commissioner to cancel an entry. Gray *vs.* Stockton, 8 Minn. (1863), 529; McLane *vs.* Bovee, 35 Wis. (1874), 36; Harkness *vs.* Underhill, 1 Black (1861), 316; Bates *vs.* Herron, 35 Ala. (1859), 127; Gaines *vs.* Thompson, 7 Wall. (1868), 347. But any power of the Commissioner to cancel a patent is strenuously denied.

Said the supreme court of Louisiana: "Even admitting the right of the Commissioner of the General Land Office to cancel an entry and sale of public lands before the issuing of a patent, yet the moment a patent has passed the great seal it is beyond the power of the officers of the general government. It is true the instrument in this case has been withheld (from delivery), but we conceive that the mere possession of the parchment does not affect the rights of the patentee." Lott *vs.* Prudhomme, 3 Robinson (1842), 296.

It is admitted that the Commissioner can cancel a patent upon a request by its owner, and then issue another in its place, where the first one was inoperative because of a clerical mistake in the name of the patentee. Bell *vs.* Hearne, 19 Howard (1856), 262.

The Supreme Court has justified the department in recalling a patent which the patentee refused to accept. Said the court: "None of the representatives of the donee ever asked for that survey, nor ever consented to receive the patent. The Secretary of the Interior recalled it, and it was promptly returned as having been improvidently issued. Justice and truth were both subserved in the course pursued." Maguire *vs.* Tyler, 1 Black (1861), 199; *Ib.*, 8 Wall (1869), 661; Le Roy *vs.* Clayton, 2 Sawyer (1874), 498.

A patent was issued in 1858. The executor of the patentee refused to receive it. The land was in litigation. The patent was assailed as illegally issued and as null and void; but the Commissioner in that case pursued the proper course. Instead of recalling it he directed the register to deliver it to the clerk of the court where the litigation was pending to await the result of the suit. Watterson *vs.* Bennett, 18 La. Annual (1866), 253.

This is the view taken by the Supreme Court: "Patents are sometimes issued unadvisedly, or by mistake, when the officer has no authority in law to grant them, or where

* *Contra*, Phillips *vs.* Sherman, 36 Ala., 189, found since this argument was written.

another party has a higher equity and should have received the patent. In such cases *courts of law* will pronounce them void. The patent is but evidence of the grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority; but one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." United States *vs.* Stone, 2 Wall (1864), 535.

Said the Supreme Court in 1866: "Whether regarded in that aspect (a valid patent) or as a void instrument, issued without authority, it *prima facie* passed the title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument. * * The power of a court of equity by its decree to vacate and annul the patent, under the circumstances of this case, is undoubted. Hughes *vs.* The United States, 4 Wall, 232.

In other words, the Commissioner cannot cancel a patent, because that is a judical act. He can no more cancel a patent issued by himself than by his predecessor, for the act of cancellation in either case is a judicial act which requires the judgment of a court. He can cancel it with its owner's consent; but without such consent the cancellation can be effected only through the aid of a court of equity. The mistakes of a physician are buried 6 feet under ground, but the mistakes of a lawyer or a public officer are never buried. They live as monumental reminders of his errors long after his body has become common with the dust in which it was covered. So no doubt the department would gladly bury its own corpses; for we admit that it is not pleasant to have constantly held in its sight the bleached skeletons of its patents which have died of the judiciary.

Commissioner Drummond in 1870 issued a patent and sent it for delivery to the surveyor-general of California; but he recalled it by telegram and wrote "Cancelled" across the face of it without any assent of its owners. The court held that the Commissioner could not divest a vested title by cancelling the patent or the record of the patent without the knowledge or consent of those interested. (Le Roy *vs.* Clayton, 2 Sawyer, 497.) After it was recorded, said Justice Field, "The officers of the government were powerless to change it or cancel it without the consent of its owner. It was then his muniment of title, and he was entitled to its possession whenever demanded." (Le Roy *vs.* Jamison, 3 Sawyer, 394.)

Your honor may write "cancelled" across the face of McBride's patent, but when he gets before a court the endorsement will be held as an unimportant memorandum, and of no consequence. Branson *vs.* Wirth, 17 Wall (1872), 44; Merrill *vs.* Hartwell, 11 Mich. (1863), 200.

The appellant still will have a standing in a court of equity. Lindsey *vs.* Hawes, 2 Black (1862), 554.

But the law of this case is so plain that counsel has advised him to seek his remedy without further delay by an application to the supreme court of the District of Columbia for a writ of *mandamus* to compel a delivery of the patent. Surely this case does not fall within the eight adjudicated cases which are cited in The Secretary *vs.* McGarrahan (9 Wallace, 298), or within any cases since decided by the Supreme Court. Here the petitioner would not be seeking to compel the department to issue but to deliver his patent. The exercise of judgment and discretion, with which a court will not interfere, have been exhausted by the issue, and the court can control the ministerial act of delivery, as in that no judgment or discretion exist.

In this connection the appellant is pleased to cite the case of Moore *vs.* Robbins. From the confidence with which the department has heretofore relied upon it, he felt it was squarely against him, but he now believes that his fears were groundless. Said the court: "There is no statute of limitations against the government, and if this right to reconsider and annul a patent after it has once become *perfect* exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further; the existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded."

As the department has largely advertised its power to recall and cancel patents upon the authority of Moore *vs.* Robbins, counsel invites the officers of the department to meditate upon a reputation which Mr. Justice Miller fails to admire. Said that eminent jurist: "*If this were not so the titles derived from the United States * * * would be always subject to the* FLUCTUATING *and in many cases* UNRELIABLE *action of the Land Office.*" (Moore *vs.* Robbins, 6 Otto, 534.)

Was it not to correct the fluctuations of an unreliable officer that the Supreme Court gave the Land Department to understand that when a patent has been *issued* the courts will relieve your honor of the burden of deciding upon the validity of his acts? Johnson *vs.* Towsley, 13 Wall. (1871), 84; Shepley *vs.* Cowan, 1 Otto (1875), 340.

Said the Chief Justice in delivering a late opinion of the Supreme Court: "It is undoubtedly true that when the right to a patent is complete, and the last formalities of the law in respect to its execution and issue have been complied with by the

officers of the government charged with that duty, *the record* will be treated as presumptive evidence of its delivery to and acceptance by the grantee." McGarrahan *vs.* The New Idria Mining Co., 6 Otto (1877), 323.

Under what shadow or color of authority does your honor hold that the department can control the delivery of a patent in face of this most recent decision upon the question, where a *perfect record* and *not delivery* is held to be the vital thing which confers title?

If the Land Department is now to decree a cancellation of McBride's patent it will look in vain to find its justification among the decisions of the courts by which it professes to be guided. Mr. Justice Davis, in delivering the opinion of the Supreme Court in Eldred *vs.* Sexton, 19 Wall. (1873), 197, unqualifiedly held that the Commissioner can cancel an invalid *entry*. But the same judge does not concede any such power to cancel a *patent*, though it was absolutely void when granted. Morton *vs.* Nebraska, 21 Wall (1874), 674.

The court claims that such an act is a prerogative of the judicial and not of the executive branch of the government. Polk's Lessee *vs.* Wendell, 9 Cranch (1815), 99; Minter *vs.* Crommelin, 18 How. (1855), 88; Mowry *vs.* Whitney, 14 Wall (1871), 439.

If the authorities upon this question were divided, the Land Department with some claim of justice might insist that the executive branch of the government "in the wise exercise of a public policy" should not yield this asserted jurisdiction, because frauds are sometimes committed, and that it will not strip itself of power to prevent or punish frauds, either upon itself or others. But when through a long series of years the courts have uniformly condemned its practice, notwithstanding the frauds, it would seem wise in the department to change its course. To defy the adjudications of the courts and to destroy a muniment of title is truly an exhibition of power. But it is indefensible. A further exercise of this practice will only continue to call forth in stronger terms the condemnation of the courts.

The cancellation of a patent against its owner's consent, by an executive officer of the government, is authorized by no law; it is sanctioned by no court.

II.

Counsel now proceeds to argue that the act of the Territorial legislature of Utah incorporating the city of Grantsville is contrary (1) to the organic act of Congress establishing that Territory; (2) to the acts of Congress permitting incorporations in the several Territories; and (3) to the town-site acts of Congress now in force.

1. The organic act reads (R. S., sec. 1851): "SEC. 6. * * That the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; *but no law shall be passed interfering with the primary disposal of the soil.* * * All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.

"Sec. 15 relates to land sections 16 and 36, for schools." (9 Statutes at Large, page 453; Compiled Laws of Utah, 1876, pages 30, 34.)

Counsel confesses his diffidence at this stage of his argument; for he is now confronted by a decision of Mr. Justice Miller, of the United States Supreme Court, which will be claimed by opposing counsel as decisive of the grave issues presented in the 2d ground of appeal. (Root *vs.* Shields, 1 Woolworth, C. C., 1868, p. 340.)

Let us look at the facts of that case. The Territory of Nebraska, in February, 1857, incorporated the city of Omaha, with an area of over 3,000 acres. In March of that year its authorities, under the act of Congress of 1844, entered 320 acres as a town site. Outside of the town site, but inside of the corporation, one Shields pre-empted 160 acres. Strange as it may appear, although his entry was cancelled in 1858 by Mr. Secretary Thompson, and the land sold at public auction in 1860, and deeds for it given in January, 1861, and possession surrendered to the purchaser, Mr. Secretary Smith, in December, 1861, without any further hearing, and upon the record which was before his predecessor, reversed all previous decisions, vacated the public sale, and issued a patent to Shields in 1863.

Justice Miller said: "What were Shields' intentions? We see him entering into a very small portion of the tract, under an apparent claim inconsistent with a pre-emption right. We see him selling and repurchasing the lots as town lots, which can hardly be reconciled with the claim to the tract as agricultural land. We see him, in a most important document made and filed in a public office, in order to acquire title to another tract, describing himself as residing elsewhere. We see him removing from the land which he here claims, continuing absent therefrom a much longer time than he even, from first to last, resided upon it; and during all this time he never asserts any claim to the tract under the pre-emption law. The conclusion is irresistible that he had no idea of asserting or of having any other rights than such as he had in the lots alone, and under the city company's deeds. He certainly never asserted any right of pre-emption to the whole quarter-section. * * It was not till September, 1857, that

Shields acquired or asserted a right of pre-emption in the tract." The patent of Shields might have been declared void *ab initio* on this statement of facts.

It was to save such a patent that Shields' counsel attempted to explode the charter of one of the first cities in the West, which, at the census of 1870, was rivaled in population by only two cities between the Missouri River and the Pacific Ocean—Sacramento and San Francisco. He raised two points of law:

1. That the Territory could not incorporate a city.

2. That such an act of incorporation was inconsistent with the organic act of Congress establishing the Territory.

The counsel urged that if the Territorial legislature can, by incorporating a city, withdraw the lands included within its limits from the privileges of pre-emption, it may, and it does thereby, interfere with the primary disposal of the soil.

But the learned Justice overruled them both. Yet, he said: "If including public lands within the limits of an incorporated city *is* an interference with the primary disposal of the soil, then the new States *cannot* pass an act incorporating a city located on the public lands." In view of the acts of Congress of 1857 permitting *certain specified* incorporations in the several Territories, we wish that he had made distinctions between the powers of a State and of a Territory. But he seems to have rested his decision upon the ground that this power in the *States* was never denied; that it has always been exercised by them exclusively of the Federal Government; that the legislation of Congress concedes the power; and because the prohibition of interference has its place in acts admitting *States* as well as in acts organizing *Territories*. To this counsel says, while he thinks that a State, where there are public lands, may incorporate a city for municipal powers and privileges, as for police government, or more effectually to preserve the public peace, or to construct works of public improvement, yet, he fails to remember when Congress has ever acknowledged that a city can acquire a title to public lands or exercise exclusive powers over them by procuring a charter of incorporation.

Justice Miller further said: "It is true that at the common law a municipal corporation can only take and hold the title to such lands as its corporate necessities require. Nor do I think it can do indirectly what it cannot do directly. * * But, in Nebraska, that rule does not obtain. It has been changed by statute. It is provided that towns and cities may grant, purchase, hold, and receive property, both real and personal, within such town, and *lease*, *sell*, and *dispose* of the same for the benefit of the town. In that view the objection is not tenable.

Counsel says that if such a law is not an interference with the primary disposal of the soil, he thinks it would be difficult to make a law that is repugnant to the organic act of Congress by which the Territories are established. As to the considerations of mischief growing out of an undue extension of the limits of cities by the legislatures of States or Territories, in order to exclude large bodies of land fit only for agricultural purposes from the beneficent operations of the pre-emption act, and so to defeat the object of Congress, the Justice further answered, we think evasively, that the argument of counsel was "specious rather than sound," because, "If the local legislature were so unwise as to endeavor to defeat the purpose of a law enacted for the benefit of its constituents, Congress could readily, and certainly would immediately, remedy the evil." * * "The clause in the organic act was intended to forbid the Territorial legislature passing any law to dispose of the public lands as if on its own authority, or intermeddling with the mode by which the general government should dispose of them, or assuming any authority or jurisdiction in respect of that business." It is claimed here that the Territory of Utah has done just these things which the organic act intended to forbid.

But the appellant observes that the facts in the case of the Omaha charter are very different facts from those in the case of the Grantsville charter. There a patentee assailed the charter of an actual city. In 1870 Omaha had 16,000 people—one-seventh the population of the entire State of Nebraska. It lies upon the Missouri River; half a dozen railroads center there, and it is the eastern terminus of the Pacific Railway. But here a patentee attacks the charter of a so-called city of 1,200 people, whose only known commerce consists in small farming and gardening, and in raising more Mormons; whose town consists of a public hall, the co-operative store, two blacksmith-shops, and a private school-house; they have no river—no railroads; their lands must be irrigated to make them productive; they are not ten miles from the Dead Sea of America, and yet they have a corporation four times as large as that of Omaha.

It was the wise exercise of a public policy which led the first jurist of the bench to sustain the charter of Omaha, extending thousands of acres beyond the patented town-site for 320 acres, although to do it he had to go largely outside of authority. The student of his decision will not fail to discern a disposition of the Justice to preserve the charter at all hazards, although he thereby announced some principles of law which are far in advance of the adjudicated cases. He boldly made the most liberal construction of the law, but his grand decision stands alone; for we find no other decision where these great questions have been considered. He defended the charter

mainly because the land within its limits was *likely to be required* for the purposes of a city. But in that city, said Chief Justice Mason, "The exclusion of lands * * * from its privileges was disregarded * * * by the land department of the government; * * * serious litigations have sprung up." (Bradshaw *vs.* The City of Omaha, 1 Nebraska, 26).

Here is the charter of Grantsville:

SEC. 1. *Be it enacted by the governor and the legislative assembly of the Territory of Utah,* That all that district of country embraced in the following boundaries in Tooele County, to wit: commencing 2½ miles due east from a point known as the lumber bridge, situated on the county road running through Grantsville, in Tooele County, thence south two miles, thence west 4½ miles, thence north 4½ miles, thence east 4½ miles, thence south 2½ miles to the place of beginning, shall be known and designated under the name and style of Grantsville City. * * *

"SEC. 2. The inhabitants of said city * * * shall have power * * * to purchase, receive, hold, sell, lease, convey, and dispose of property, real and personal, for the benefit of said city, both within and without its corporate boundaries, to improve and protect such property, and to do all other things in relation thereto as natural persons. * * *"

With such a state of facts as are here under review, can it be supposed that Mr. Justice Miller would have upheld the charter of Grantsville? Will anybody contend that if Bladensburg were incorporated with the same quantity of land, and with the same powers and privileges of the city of Washington, that he would equally uphold both charters? It is to be regretted that the learned Justice did not annul the Shields patent, solely because he was not a *bona fide* settler. It is more to be regretted that the Justice placed himself upon record as saying that the act of a Territorial legislature incorporating a city—no matter what the limits, whereby its chartered lands become withdrawn from pre-emption by the operation of a superior law, the act of Congress of 1841—is *not* an interference with the primary disposal of the soil. Because, look! the Territorial legislature of Utah incorporated 37 cities, with charters holding complete powers over property within limits of from 4 to 40 square miles, and, under his decision, the cities having town-site patents could still exercise powers over the incorporated area until March 3d, 1877.

	Name of city.	Square miles.	Incorporated.	Population, 1870.	Areas in and date of town-site patent.
1	Alpine	4	January 19, 1855	208	March 10, 1870 160
2	American Fork	16	June 4, 1853	1,115	May 1, 1872 1,120
3	Beaver	36	January 10, 1867	1,207	June 20, 1872 1,280
4	Brigham	12	" 12, "	1,315	May 1, 1872 1,280
5	Cedar	36	February 18, 1868	517	July 10, 1872 320
6	Coalville	20	January 16, 1867	626	May 6, 1879 640
7	Corinne	.....	February 18, 1870	783	May 6, 1874 168 80/100
8	Ephraim	12	" 14, 1868	1,167	May 1, 1872 640
9	Fairview	.....	" 16, 1872	531	May 1, 1872 320
10	Fillmore	36	January 12, 1867	905	May 1, 1872 1,120
11	Grantsville	18	"	755	
12	Hyrum	9	February 10, 1870	708	July 10, 1872 640
13	Kaysville	18	" 13, 1868	1,422	Patent application pending.
14	Lehi	16	February 5, 1852	1,058	May 1, 1872 1,280
15	Logan	16	January 16, 1866	1,757	September 2, 1872 2,521 50/100
16	Manti	16	February 6, 1851	1,239	September 2, 1872 1,280
17	Mendon	9	" 12, 1870	345	September 2, 1872 480
18	Morgan	.....	" 13, 1868	1,972	February 25, 1876 880
19	Maroni	40	January 17, 1866	633	May 1, 1872 360
20	Mt. Pleasant	16	February 20, 1868	1,346	May 1, 1872 1,270 84/100
21	Nephi	16	March 6, 1852	1,286	May 1, 1872 1,121 55/100
22	Ogden	20	January 18, 1861	3,127	August 2, 1872 2,480
23	Parowan	25	February 13, 1868	861	September 25, 1874 760
24	Payson	25	" 20, 1865	1,436	May 1, 1872 840
25	Pleasant Grove	40	January 9, 1855	930	May 1, 1872 640
26	Provo	25	" 21, 1864	2,384	September 13, 1871 2,240 70/100
27	Richmond	16	February 6, 1868	817	September 25, 1874 840
28	Saint George	25	January 17, 1862	1,142	July 10, 1872 *1,285 26/100
29	Salt Lake City	49	" 20, 1860	12,854	July 1, 1870 †5,730 15/100
30	Smithfield	16	February 6, 1868	744	August 2, 1872 800
31	Spanish Fork	30	January 19, 1855	1,450	March 20, 1875 840 80/100
32	Springville	25	February 13, 1852	1,661	May 1, 1872 800 15/100
33	Spring	16	" 11, 1870	623	May 1, 1872 440
34	Tooele	9	January 13, 1853	958	July 10, 1872 1,280
35	Washington	20	February 18, 1870	463	December 1, 1873 400
36	Wellsville	16	January 19, 1866	885	September 2, 1872 1,160
37	Willard	6	Feb'y 16, 1870	552	August 15, 1876 582 40/100

* Patent returned for correction and not yet re-issued.

† Special act of Congress.

It may not be difficult to show unto your honor that the legislature of Utah cannot rely upon the decision of Mr. Justice Miller in the case so carefully analyzed, for such an unwarrantable construction of law as is implied by its acts creating incorporations of cities.

Will your honor now indulge counsel in quoting from history:

"Brigham Young and his pioneer followers arrived in Salt Lake Valley on July 24, 1847. The main body of the Saints arrived there in the autumn of 1848. In March, 1849, a convention at Salt Lake City organized the State of Deseret, signifying 'the land of the honey bee.' A legislature was elected, and a constitution sent to Washington. But Congress refused to recognize the new State, and in September, 1850, organized the Territory of Utah; Brigham Young was appointed governor by President Fillmore. He drove out the Federal judges, and the laws of the United States were openly defied and subverted. This led to the removal of Brigham Young. His successor, Colonel Steptoe, of the U. S. Army, arrived in Utah in 1854, but after wintering in Utah he removed with his battalion to California. Most of the civil officers arrived in Utah a few months after Colonel Steptoe's departure. They were harassed and terrified. In February, 1856, a mob of armed Mormons, instigated by summons from the heads of the church, broke into the court-room of the U. S. district judge, and at the point of the Bowie knife compelled Judge Drummond to adjourn his court *sine die*. Soon afterward all the U. S. officers, except an Indian agent, were forced to flee from the Territory. After these and similar outrages, President Buchanan determined to supersede Brigham Young in the office of governor, and send to Utah a military force to protect the Federal officers, and to compel obedience to the laws. In 1857 the office of governor of Utah was conferred upon Alfred Cumming, and that of chief justice on D. R. Eckles, of Indiana, and a force of 2,500 men under experienced officers was sent to protect them in the exercise of their functions. The Mormons were greatly excited at the approach of these troops. Young, in his capacity of governor issued a proclamation denouncing the Army as a mob, and forbidding it to enter the Territory, and calling the people of Utah to arms to repel its advance. The Army reached Utah in September and on October 5 and 6 a party of mounted Mormons destroyed several of the supply trains, and in a few days later cut off 800 oxen from the rear of the Army, and drove them to Salt Lake City. The Army, of which Colonel Albert Sidney Johnson had by this time assumed the command, was overtaken by the snows of winter before it could reach Salt Lake Valley, and about the middle of November went into winter quarters near Fort Bridger. On November 27, Governor Cumming issued a proclamation declaring the Territory to be in a state of rebellion. In the spring of 1858 a good understanding was brought about between Governor Cumming and the Mormon leaders, and toward the end of May a proclamation of the President offered pardon to all Mormons who would submit themselves to Federal authority. This offer was accepted by heads of the church, and shortly afterward the troops entered Salt Lake Valley, and were stationed at Camp Floyd, on the western side of Lake Utah, about 40 miles from Salt Lake City, where they remained until May, 1860, when they were withdrawn from the Territory." The American Cyclopedia (N. Y., 1875), volume 11, page 836, subject "Mormons."*

It will thus be seen that the people of Utah attempted to establish an independent government. They cherished that intention for many years. They subverted the laws of the United States. They lived in open rebellion against its authority. To compel their obedience required the presence of an army and the expenditure of $14,000,000. Though conquered and pardoned, we read of the independent govern-

*On the 5th April, 1852, "Deseret" merged into Utah officially, but the State organization was continued and exists to-day as much as it ever did. Nominally the civil authority is Utah; *de facto* it is Deseret. The government pays the Territorial legislators their *per diem* for making the laws of Utah, and hands them their mileage at the end of the session. On the day succeeding the close, Brigham, as governor of Deseret, convenes them as a State legislature, reads his message to them, and some one proposes that the laws of the legislature of Utah be adopted by the State of Deseret.—The Rocky Mountain Saints. By T. B. H. Stenhouse† (N. Y. 1873), page 276.

This was Brigham Young's proclamation, September, 15, 1857:

Therefore, I, Brigham Young, governor * * *

1st. Forbid all armed forces of every description from coming into this Territory under any pretense whatever.

2d. That all the forces in said Territory hold themselves in readiness to march at a moment's notice to repel any and all such invasion.

3d. Martial law is hereby declared. * * * (Stenhouse, page 359.)

The United States expended $14,000,000 to fit out the expedition against which the above proclamation was issued. (*Ib.*, page 421.)

When, on the 11th April, 1862, the first telegram was sent across the continent the legislature of the "State of Deseret" was then in session. (*Ib.*, 593.)

On the 2d October, 1862, with loaded rifles, fixed bayonets, and shotted cannon, General P. E. Connor marched the volunteers into Salt Lake City; and he established Camp Douglas at the base of the Wasatch Mountains. (*Ib.*, 603.)

Assassinations by Mormons continued up to 1866, and military orders to preserve the peace were issued as late as September 15, 1870. (*Ib.*, 617, 680.)

†Twenty-five years a Mormon elder and missionary and editor and proprietor of the Salt Lake Daily Telegraph.

ment, the State of Deseret, as late as the year 1862. Will any one contend in face of these facts that their incorporation of cities, to the extent and number stated, was not an intended interference by them with the primary disposal of the soil?

At the same time that the legislature of Utah was incorporating its cities with the liberal (!) area stated, it made some interesting memorials to Congress. The first one appears among its laws for the 10th session, and related to a donation of lands for cities, towns, and villages. It reads:

"To the honorable the Senate and House of Representatives of the United States in Congress assembled:

"Your memorialists, the governor and legislative assembly of the Territory of Utah, pray your honorable body *to grant* unto the inhabitants of cities, towns, and villages in this Territory a *donation of the land included within their respective surveyed and recorded plats*, and which are actually occupied, the right of soil to be secured by patent issuing from the land office to trustees appointed for the purpose by the inhabitants of their respective cities, towns, and villages; said right of soil to be conveyed by said trustees to the settlers upon lots, the proceeds to be placed in a fund by the said trustees for the support of common schools. Your favorable consideration and early action upon this subject is respectfully solicited.

"Approved January 18, 1861."

Satisfied that its incorporated cities had no title to the land on which they stood, it made during its 16th session another memorial to Congress for a donation of town-sites in aid of a common-school fund, as follows:

"To the honorable the Senate and House of Representatives of the United States in Congress assembled:

"Your memorialists, the governor * * * respectfully pray your honorable body *to donate to this Territory the lands included in the recorded plats of the several cities*, towns, and villages of this Territory to aid in laying the foundation for a common-school fund for the benefit of the Territory and future State; said lands to be disposed of under such regulations as the legislature may provide.

"Approved January 17, 1867."

During January, 1867, it is a significant fact that the legislature of Utah incorporated five cities—Beaver, Brigham, Coalsville, Fillmore, and Grantsville; each having nearly the same specified powers over the public lands of the United States. The Grantsville charter differs but slightly from the others, and reads, "to purchase, receive, hold, *sell, lease, convey, and dispose of property real and personal* for the benefit of said city, *both within and without its corporate boundaries;* to improve and protect such property, and to do all other things in relation thereto as natural persons."

The legislative memorial made February 13, 1869, during its 18th session—praying that the town-site act of Congress of 1867 might be so amended as to authorize in all cases where the population shall exceed 5,000 the entry of 2,560 acres for each 5,000 inhabitants, or so much thereof as may be necessary—specially represented that Salt Lake City, in its surveyed and occupied lots, embraced about three times the amount of land permitted to be entered by the provisions of the act of 1867; and that to limit the entry of town-site lands would work a severe hardship upon a large portion of the occupants. Congress accordingly enacted, on July 1st, 1870, "that the words 'not exceeding 5,000 in all' contained in an act * * * approved March 2d, 1867, shall not apply to Salt Lake City * * *; but said act shall be so amended and construed in its application to said city that lands may be entered as provided in said act for the full number of inhabitants contained in said city, not exceeding 15,000; *and as the said city covers school section numbered* 36, * * *the same may be embraced in such entry, and indemnity shall be given therefor*, when a grant shall be made by Congress of sections 16 and 36, in the Territory of Utah, for school purposes. (16 Statutes at Large, 183, sec. 2390 R. S. U. S., page 437.)

Your honor may possibly wish to make a note of the foregoing enactment, as the so-called city of Grantsville is located upon a school section.

From the foregoing it will be perceived that the legislature of Utah has three times publicly acknowledged the invalidity of its acts in the incorporation of municipalities, by which, according to the annual report of the land department for 1875, when the honorable Mr. Burdett (one of opposing counsel) was Commissioner, the *Territorial authorities of Utah asserted control over the whole accessible or possibly valuable portions of the Territory.* His views then are so germane to this subject of interference with the primary disposal of the soil of the United States, that the appellant quotes them bodily.

Said Mr. Burdett, "This tendency to the assertion of undue and indefensible authority over the property of the United States is well illustrated by the practice found to prevail of including vast areas of the public lands within the limits of incorporated cities and towns. That such inclusion is not dictated by the legitimate requirements

of the municipality which asserts its power over them, and that the extent of the asserted limits is not in any manner referable to the number of inhabitants making up the enumeration will readily appear by a recital of facts as to some of the towns within that Territory.

The city of Salt Lake was found by the census for 1870 to contain a population of 12,854 souls. The town-site entry, as authorized by the act of July 1, 1870, embraced $5{,}730\frac{45}{100}$ acres, but the lines of the incorporation include 49 square miles, or upwards of 31,000 acres. Cedar City had in 1870 a population of 517, with an incorporated area of 36 square miles. The town of Beaver, of 1,207 persons, also asserts corporate authority over 36 square miles. Fillmore, of 905 people, has the same extent. Deseret, with only 150 persons, has a like limit, while Pleasant Grove, with 930, and Maroni, with 633 persons, each includes 40 square miles of Territory within its limits. * * * "To show how comprehensive the plan is, it may be mentioned that in going south the traveler enters the corporate limits of Lehi when he enters Utah County, and from that into American Fork, and so into Pleasant Grove, Provo, Springville, Spanish Fork, Payson, &c., passing out of one only to enter another, so that through the length of the county he is within 'corporate limits,' though for much of the distance he is miles from any habitation; and for the entire distance of 300 or 400 miles south to Saint George, as a general rule, *he is within the limits of a corporation when he is not on the desert.*"

Presuming, as may be done, that the towns and villages mark the centers of the territorial area found desirable for settlement, and it follows that many of the best and most accessible lands of Utah have been by these means withdrawn from homestead and pre-emption settlement. True, many tracts have, in fact, been entered and patented, and many more are now occupied and will hereafter be claimed under the pre-emption and homestead laws. Of those patented a proper definition of boundaries will undoubtedly show a very large acreage to be within the excepted limits. An examination of entries within the recently defined boundaries of Salt Lake City discloses the fact that upwards of 10,000 acres of patented land are found to be in this category; in other words, claimed and held under *invalid patents*, and therefore subject to be defeated whenever the United States may see fit to authorize an action to be brought for that end. It should be mentioned that incidental to this state of things, gross abuses, which cry aloud for remedy, are made possible. The fact that so large areas are included within undefined boundaries, while it has not prevented the acquisition of the form of title by such persons as might be acceptable to the ruling element of the municipalities, the true status of the tract in such cases not being disclosed to the local officers, or to this office, yet, in cases where the settler might not, for any reason, be deemed a desirable acquisition, the state of facts presents a ready weapon for defeating both his entry and settlement. With a view to the remedy of the particular evils referred to, and which exist alone in Utah, it is recommended that the provision of the pre-emption law relating to lands included within the limits of any incorporated town be so amended as to restrict their operation as withdrawals within reasonable limits. I am further of the opinion, and so recommend, that the proclamation of the President be issued at an early day offering for sale public lands found to be contiguous to towns and cities. The law, as has been seen, contemplates such a disposal. In no other way can valid title be obtained.* (Land Office Report 1875, 51.)

Can it be possible that the counsel for the city of Grantsville will contend here that its charter is not an interference with the primary disposal of the soil when no person but a Mormon, or one who was "acceptable" to Mormon authorities, could acquire a homestead in those portions of Utah which alone are desirable for habitation? If now he thinks otherwise; why did he say, when a public officer, that a creation of such charters is the assertion of an undue and indefensible authority over the property of the United States?

Is it not an interference with the primary disposal of the soil when a traveler go-

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*We acquired Utah from Mexico in 1848. Congress organized it as a Territory September 9, 1850. It then extended from the Rocky Mountains westward to California, and from the southern boundary of the Territory of Oregon, or the 42d parallel, southward to the 37th parallel. Its area was 220,196 square miles. Congress has set off from its original area as follows:

Feb'y 28, 1861, to Territory of Colorado, 29,500 sq. miles.
March 2, " " " " Nebraska, 10,740 square miles.
" " " " Nevada, 73,574 " "
May 5, 1866, State of " 18,326 " "
July 25, 1868, to Territory of Wyoming, 3,580 " "
The present area of Utah is 84,476 " " which is larger by over 20,000 square miles than the entire territory of the six New England States.

In the 9th census, for 1870, the true population of Utah is given as white, 86,044; colored, 118; Chinese, 445; total, 99,581. There were then 165 church organizations, of which 160 were Mormon; 164 edifices, having 86,110 sittings, the Mormon sittings being 85,350.

Here is the progress of the Mormon church:

7th census (1850), 9 edifices, 4,200 sittings, $51,000 property.
8th census (1860), 21 edifices 12,950 sittings, $888,700 property.
9th " (1870, 161, " 83,350 " 642,000 "

Volume of Population and Social Statistics, 9th Census, pages 506-516-579.)

ing southward through Utah, from Lehi to St. George, or for a distance nearly as far as from Washington City to Boston, is, as a general rule, although miles from any habitation, within the limits of an incorporated city when he is not upon the desert? for the law of 1841 says that no man can make a pre-emption within the limits of an incorporated city.

Is it not an interference with the primary disposal of the soil when the head of the land department had admitted that patents for 10,000 acres of land within the limits of Salt Lake City alone are invalid patents; where rights supposed to be valid and vested needed a confirmatory act of Congress, the act of 1877, to make even a patented title good?

Will the counsel explain how such facts, as exist alone in Utah, bear out the decision of Mr. Justice Miller that the quantity of land which a corporation can hold at common law can be completely abrogated by the law of a Territory, which has no sovereign capacity (?) and that the legislature of Utah can enact that towns and cities "may grant, purchase, hold, and receive property, both real and personal, within such town, and *lease, sell, and dispose of the same for the benefit of the town*," to an unlimited extent? If the legislature can incorporate a city with 40 square miles, can it not create a corporation of 80 square miles? Where will opposing counsel draw the line? Was the failure of Congress to pass any law before 1877 to remedy this evil a concession of power to the unlimited extent exercised?

Let us examine the powers possessed by the Territorial legislature of Utah, in this regard, in the light of legislative authority.

At the time of the passage of the act of 1877, which practically limits the extent of municipalities on the public domain, the honorable Mr. Crounse, of Nebraska, addressed the House of Representatives as follows:

"Mr. SPEAKER: As will be seen by reference to the laws relating to pre-emption and homestead entry upon the public lands of the United States, certain lands are excluded from the operation of those laws. Among these are 'lands included within the limits of any incorporated town, or selected as the site of a city or town.'

"The laws respecting the incorporations of towns and cities within the several States and Territories which contain public land, are enacted by the legislatures of such States and Territories. The limits of any city may be more or less extended as the special or general laws referred to may permit, and in some instances to which my attention has been directed, they have been swelled beyond all propriety or any possible need for municipal purposes. The abuse of which I speak obtains more particularly in the Territory of Utah. Much of the legislation there for years is made up of *charters* to local municipalities and *grants of special privileges* of this kind. * * * With but few exceptions the population of these cities must be quite insignificant, and for which a few acres in each would suffice to meet all demands for actual municipal purposes.

"Still here are something like 750 square miles of public domain, embracing a large portion of the lands there susceptible of cultivation, brought within incorporated limits, and over which are extended municipal laws and regulations. Now, the construction given to the law denies the right of any one to enter any portion of any such town-site, notwithstanding it may be unoccupied and not used or needed for municipal purposes. Such is the decision of the courts, and such is the holding of the Interior Department. A case of some importance involving this question arose in my own State,* and was decided by Mr. Justice Miller, of the United States Supreme Court. This opinion, as I have said, confirms the ruling of the Land Department, and may be regarded as the settled law relating to entries made within the incorporate limits of any city. With the law standing thus, not only are homesteads and pre-emption entries disallowed therein when the limits of any town-site are known to the local land officers, but even where patents in such cases may have, by inadvertence, been issued, no valid title passes. Not only this, but I presume the same must hold where the lands have passed from the patentee into the hands of an innocent *bona-fide* purchaser.

"From this brief statement of facts and the law pertaining thereto, it must be evident to members that legislation is needed *to cut down these needlessly and mischievously large city limits, to restrict those which may be created hereafter, and to confirm the titles to those lands which may have been settled upon under the pre-emption and homestead laws where such settlement does not interfere with any municipal need.* This is the object of the bill. It has been framed with care, and its object and also the details of the bill have the approbation of the Commissioner of the General Land Office. I ask that the bill be put on its passage." The bill was then read the third time and passed. (Proceedings in the House of Representatives, April 13, 1876, Congressional Record, vol. 4, part 3, 44th Congress, 1st session, page 2460.)

Judicial decisions bearing upon this question of interference with the primary disposal of the soil are not numerous. In the year 1872 the supreme court of Nevada held

*Root *vs.* Shields.

that under the act of Congress organizing the Territory of Utah, which provided that its legislature should pass no law interfering with the primary disposal of the soil, no act of the legislature would have been valid that in any way attempted to confer any right to the water of the streams on the public lands. Said the court: "The organic act of Utah declared that the legislature should pass no law interfering with the primary disposal of the soil. Now, as we have shown that a natural watercourse is an incident of the land, in fact a part of the soil, in the language of some of the cases, it is clear that no act of the legislature of Utah would be valid which in any way attempted to confer any right to the water of the streams on the public land. An act conferring a right to divert a stream would be of no more validity than one authorizing the cutting of timber, or, indeed, granting a title to a portion of the public land itself. It would be a bold interference with the primary disposal of the soil. The diversion of a stream from its natural course might more completely change the character of the land through which its course lay, and decrease it in value, than to strip it of its timber. Hence the one act can be no less an interference with the primary disposal of the soil than the other, and surely no one will contend that an act of the Territory of Utah authorizing him to cut timber on the public land would confer upon him any right as against the United States or its grantee, or that such an act could be sustained for a moment against the provision of the organic act referred to. It might as well be claimed that, because the Territorial legislature of Nevada passed acts regulating the manner of holding and obtaining possession of public land, therefore the United States is bound by such acts, and could not afterward interfere with the possession acquired under or in accordance with them. The Territorial courts, in conformity with Territorial statutes, uniformly held that any person could hold as much land as he chose to inclose or cultivate. Such was always the rule until the surveys by the United States, and the land was thrown open to pre-emption. But no one has ever had the hardihood to claim that the Territorial statutes, customs, or decisions gave any right as against the pre-emptor or the United States. The man who may have enjoyed and cultivated for years his thousand acres was compelled to submit to the act of Congress, which only authorized him to pre-empt 160 acres of it."

Mr. Chief Justice Lewis, upon a rehearing, affirmed the first decision, and delivered the opinion of the court. (Van Sickle *vs.* Haines, 7 Nevada, 278.)

In the year 1874, the Territorial act of Montana of January 12, 1872, which provides "for the forfeiture to the Territory of placer mines held by aliens," was declared void by the supreme court of Montana. The act was repealed by the legislature January 15, 1874. The court held that the act was not in harmony with the organic act of Congress establishing the Territory. "The organic act provides that the Territorial legislature shall pass no law interfering with the primary disposal of the soil. Notwithstanding the organic act whereby a temporary government is created for the Territory, the general government, being the owner of the soil, still retains its ownership, and has made all the necessary laws and regulations directing how its property shall be disposed of, and how title thereto shall be conveyed. The Territory can enact no valid law that in any manner impedes, modifies, or varies the operation of the laws of the general government as to the disposal of its lands. Neither can the Territory do by indirection what it is prohibited from doing directly, so that *if any Territorial statute, enacted for a local or for a temporary purpose, in its workings, in its operations and effects, defeats the laws of Congress as to the disposal of the public lands of the Territory, such statute is necessarily void.* Laying aside the fact that the Territory thus becomes the owner of property that does not belong to it, yet it obtains possession of the title, and this possession necessarily interferes with the disposal of the soil by the United States to the citizen or settler. If the possessory title is forfeited the property should again become subject to location by the persons entitled to make such location. But the Territory comes forward and says by its legislature 'that although the title to this property is forfeited, and it thereby becomes subject to entry and location, yet I have acquired this property, and if any one obtains possession of it they must purchase of me.' The Territory thus acquires a possessory title in violation of the act of 1866 and in direct violation of the organic act, for the title of the Territory interferes directly with the primary disposal of the soil to the citizen by the general government. It does not require argument or authority to determine that if the Territory holds possession of mining claims it interferes with the acquisition of possession by the citizen, and thereby interferes with the disposal of the soil; and the fact that the Territory is authorized to sell its possessory title by causing an execution to issue does not help the matter, for by this means the primary disposal of the soil is transferred from the general government to the Territory. This statute is in conflict with the organic act."

In this case the opinion was announced by Mr. Chief Justice Wade. Mr. Justice Servis rendered a concurring opinion, while Mr. Justice Knowles dissented. Each of the justices filed exhaustive opinions, and they are of unusual interest and ability. (The Territory *vs.* Lee, 2 Montana, 124.)

Counsel remembers this language of Mr Justice Miller in Root *vs.* Shields: "An ac incorporating a city which is located on the public lands does not, by its own force

withdraw lands from pre-emption. That effect is produced by the Congressional provision and is remote, indirect, and only consequential." The proper construction to be given to this language of the distinguished Judge is this, to interpret the term "incorporated city" as it was understood at the time when Congress enacted the pre-emption law of 1841. Said the supreme court of Minnesota, in 1859: "The object and idea of settling and building a town is not for the purpose of *agriculture*, but for that of *trade*. * * * And the requirements of the act of 1844, as to settlement and occupancy, are complied with when these are such as to attain the object in view, namely, *the use of the land as a town-site for purposes of trade, commerce, or manufactures*,"—not for small farmers and gardeners. (Leech *vs.* Rauch, 3 Minn., 453.)

Counsel must insist that the 15-acre farmers and 5-acre gardeners, sprinkled numerously upon the public lands of the United States within the limits of Grantsville, possess in a very small degree the sinews of an incorporated city.

There will be no difficulty in construing the act of 1841 if your honor will examine the American rules for the interpretation of statutes. (Potter's Dwarris on Statutes, 1871, p. 143.)

2. *Can the legislature of a Territory create a corporation? Can it incorporate a city?*

On March 2d, 1867, Congress enacted the following provisions common to all the Territories:

[R. S., sec. 1889.] "SEC. 1. That the legislative assemblies of the several Territories of the United States, shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." (14 Statutes at Large, 426.)

This act was amended June 10, 1872: "That the first section of an act approved March 2d, 1867, * * * so far as relates to incorporations which have been, or which may hereafter be, created and organized for the business of mining, manufacturing, or other industrial pursuits, on the construction or operation of railroads, wagon-roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable, or scientific association, and for all rightful subjects of legislation consistent with the Constitution of the United States, under the general incorporation laws of any Territory of the United States, shall be construed as having authorized and as authorizing the legislative assemblies of the Territories of the United States by general incorporation acts to permit persons to associate together as bodies corporate for purposes abovenamed." (17 Statutes at Large, 390.)

The following act of Congress, approved July 1st, 1862, though common to all of the Territories, could hardly have been intended for any other than the Territory of Utah:

[R. S., sec. 1890.] "That it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the Territorial government of a greater value than $50,000; and all real estate acquired or held by any such corporation or association contrary to the provisions of this act shall be forfeited and escheat to the United States: *Provided*, That existing vested rights in real estate shall not be impaired by the provisions of this section." (12 Statutes at Large, 501.)

The law upon corporations is well known. It is sufficient to state that corporate powers are strictly construed. 2 Kent's Com. (12 ed), 299.

Notably so in this case, for Grantsville, claiming rights under statute authority, here seeks to divest McBride of his property for public purposes against his consent. (*Ib.*, 300, note *a*.)

But the modern commentator, Dillon, takes the broad ground that a Territory can incorporate a city, it being a rightful subject of legislation under an organic act.* 1 Dillon on Municipal Corporations (2 ed.), 119.

Even the right of Congress, under the Constitution, to create corporations, was earnestly disputed in early times. McCulloch *vs.* Maryland, 4 Wheaton (1819), 316; Osborn *vs.* The United States, 9 *Ib.* (1824), 860. But the law has grown with the growth of the country; and recently Congress has incorporated national banks and the Pacific Railroad Companies. 13 Statutes at Large (1864), 100; 12 *Ib.* (1862), 489; Thompson *vs.* Pacific R. R. Co. (1869), 9 Wall., 579.

The powers of Territorial legislatures have been strictly construed. The People *vs.* Slocum, 1 Idaho (1866), 62; Ferris *vs.* Higley, 20 Wall. (1874), 375. So also have corporate powers been strictly defined.

The supreme court of Pennsylvania, in 1843, invalidated an incorporation of two villages, with a tract of open farming country between them. (Case of the Borough of West Philadelphia, 5 Watts & Sergeant's Reports, 281.) And in 1860, it invali-

* The treatise on corporations (1879) by Hon. Platt Potter, late one of the justices of the supreme court of the State of New York, does not touch upon this question. Counsel knows of no author who supports to the same extent the doctrine announced by Justice Dillon.

dated another charter where a village had been incorporated with a large body of surrounding farm-lands. Said the court: "The mistake consists in supposing that any more than the village proper, with its proper territory, can be incorporated." (Burrough of Little Meadows, 35 Pa. State, 335.)

As to any inherent power of the Territories to create corporations, the courts have decided both ways. But in the following case Chancellor Walworth questioned such power, and based his opinion principally upon the acquiescence of Congress for 14 years. Still it was the unanimous decision of the court of errors of the State of New York that the Territory of Michigan had power in 1817, under the law organizing the Territory, to incorporate a banking company. Williams *vs.* The Bank of Michigan, 7 Wendell (1831), 539.

The highest courts of Missouri and Louisiana have decided that a Territory can create a corporation, and so have other courts. Riddick *vs.* Amelin, 1 Missouri (1821), 8; State *vs.* The New Orleans Packet Co., 11 Martin (1822), 309; *Ib. vs.* Young, 3 Kansas (1866), 445; Bradshaw *vs.* The City of Omaha, 1 Nebraska (—), 16; Dietz *vs.* The City of Central, 1 Colorado (1871), 323.

The Supreme Court decided as consistent with the laws of the United States an act of the Territorial legislature of Florida in erecting a court by whose decree a cargo was sold, and consequently that a sale changed the property. The Amer. Insur. Co. *vs.* Canter, 1 Peters (1828), 546.

The question here under consideration was ably presented to the Supreme Court in 1847; but it held it had no jurisdiction thereon, and so decided the case upon other grounds. In that case, Justices McLean and Nelson dissented. They held that the act to incorporate the members of the Detroit Young Men's Society was the exercise of sovereign power, a power totally repugnant to the sovereignty of the Union in its Territorial form. There was then a direct and irreconcilable repugnance in the exercise of the sovereign power of the State, so long as the Federal authority was exercised in the Territory. (Scott *vs.* Jones, 5 Howard, 381.)

The Territory of Michigan incorporated a bank, but the supreme court of Ohio declared its act void, as contrary to the organic act of Congress establishing the Territory. (Myers *vs.* The Manhattan Bank, 20 Ohio (1851), 283).

The opinion of the Supreme Court, speaking through Mr. Justice McLean, in a subsequent case, was in harmony with his dissent just cited. But there the court held that the Territory of Indiana could incorporate a university because its legislature was vested with general legislative powers under the ordinance of 1787, which was made applicable to Indiana by an act of Congress of 1800, establishing the Territory, and that the legislature was restricted only by the articles contained in the ordinance. (Trustees of Vincennes University *vs.* The State of Indiana, 14 Howard (1852), 273.)

If a Territory can create a corporation, if it can incorporate a city, there is still another light in which to view this question, because it is an incident of a corporation to take and hold real property.

Said the Supreme Court in 1861: "Grants made by a legislature are not warranties, and the rule universally applied in determining their effect is that if the thing granted was not in the grantor at the time of the grant no estate passes to the grantee." (Rice *vs.* The Railroad Company, 1 Black, 374.) In that case the Territory of Minnesota chartered a railroad company, and granted to it certain lands from the public lands, to take effect when the United States should grant them to the Territory. Not six months afterward Congress did grant the same lands to the Territory, and the day following that grant $1,000,000 was subscribed in New York City to the capital stock of the railroad company. It was strongly urged by counsel that the Territory could not create the corporation, but as the court was able to decide the case upon the ground stated, that the Territory having no title, it was then unable to grant one, the court passed very lightly upon the question which is of so much interest here. Is not that a parallel case to this? Thé "independent" Territorial legislature of Utah, or the "State of Deseret," if you please, assumed to grant to the city of Grantsville a title to land which was then and is now the exclusive property of the United States. As it had nothing to give, its act was void.

The organic act of Congress of 1850, establishing the Territory of Utah, will remain its constitution until the people there establish a State government which shall have been ratified by Congress. Then its people will have sovereign capacity. The creation of a corporation is a sovereign act. The States can create municipal corporations at pleasure, subject only to constitutional restraints. If the several Territories ever possessed the sovereign power to establish corporations, what was the necessity for Congress, in 1867, to give them such power? The legislatures *may* * * * "permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." Anything else? No. Congress conferred additional powers by the act of 1872. That act expanded the act of 1867. It permitted incorporations for railroads, wagon-roads, and irrigating ditches; for the colonization and improvement of lands in connection therewith; for colleges, seminaries, churches,

and libraries, and for benevolent, charitable, and scientific associations. Anything else? No, because the words "all rightful subjects of legislation," following, are limited by the final words of the act, "for the purposes above named."

Congress knew that the Territories had incorporated cities, and under the common law it impliedly sanctioned such incorporations for *municipal* purposes, for so far all governments have the right to protect themselves, but any greater exercise of authority would be usurpation, and we claim that it was not sanctioned.

Thus it will appear that Congress did not mean to confer in either of the acts of 1867 or 1872 the power to incorporate a city, else such power in terms would have been expressly delegated. The omission or the withholding of the power was a refusal to grant it. All objects of incorporation not named in the act are excluded; otherwise, Congress would have given the Territories full sway in the first instance. Why so carefully specify, by name, certain objects for incorporation unless the exercise of legislative power in creating corporations, is to be restricted to those objects?

The debates in Congress afford no light on this subject, as the original bills of the laws of 1867 and 1872 were simply reported, amended, and passed. But do not those acts, standing alone, show that Congress did not intend the powers of Territorial legislation to be asserted to an unlimited extent? Those acts mean either that the Territories are sovereign, but must be restrained, or that certain powers are wanting which Federal legislation can supply. Mr. Justice Knowles, in his dissent in the case of the Territory of Montana *vs.* Lee, holds that those acts are restraining acts. But counsel here offers that they were grants of power where no power before existed. Why did not Congress pass such acts for the benefit of the State? Because they already had all necessary power. U. S. *vs.* R. R. Bridge Co. (1855), 6 McLean C. C. Rep., 531, 535. Why did it pass them for the benefit of the Territories? Because such needed power was wanted there, and so Congress passed those laws to encourage and protect the investment of money in those works of public improvement which would enhance the wealth and prosperity of the people of the Territories.

3. *The act of the Territorial legislature of Utah incorporating the city of Grantsville is contrary to the town-site acts of Congress now in force, and it is a nullity.*

Congress passed an act, approved June 23d, 1874, relative to courts in Utah Territory. (18 Statutes at Large, 253.)

The 3d section preserved the authority of the probate courts in Utah to enter land in trust for the benefit of occupants of towns, under the town-site acts of 1867 and 1868. The 7th section repealed all laws of the Territory inconsistent with the Congressional act of 1874.

Was not the Territorial act of 1867, incorporating Grantsville, inconsistent with the act of 1874? Is not that Territorial act inconsistent with the spirit of all the town-site acts of Congress? Is it not manifestly inconsistent with the town-site act of 1864? If Congress provided that title to land occupied by towns might be acquired by an entry to be made by a probate judge, and the Territory had previously passed an act of incorporation solely by which a city continued to assert title after 1874, in a manner not recognized by any law of Congress, and thereby claimed an unwarrantable construction of the pre-emption act of 1841, was not such Territorial act virtually annulled?

Counsel believes that the act incorporating Grantsville was contrary to the organic act of Congress establishing the Territory, and that it was a gross interference with the primary disposal of the soil of the United States, Mr. Justice Miller's decision in Root *vs.* Shields to the contrary notwithstanding; that the Territorial legislature, under the acts of 1867 and 1872, had no power to incorporate a city, and that its only power to do so was derivable from the common law simply for municipal, that is, for police government. Even under its charter no taxes have ever been levied for municipal purposes. The incorporation for municipal purposes was a blind; it was primarily to control the lands of the United States. It is, therefore, claimed that the incorporation of the city of Grantsville with greater limits than is allowed by the town-site act of 1867 was against law and void.

The people of Grantsville are entitled to no rights before the Land Department by virtue of the Territorial incorporation. They cannot rightfully ask for a cancellation of McBride's patent, because his land is within the limits of an incorporated city.

Grantsville has not yet been selected as a city, within the meaning of the town-site act of 1864, which is still in force. The people there should be considered here no more favorably than an unincorporated city upon the public lands. It is conceded that the mayor of Grantsville is desirous, as trustee, of securing a town-site patent, but in the eye of the law—the act of 1864—he has never selected the site of the city. Therefore, the people of Grantsville are entitled to a town-site patent for such of the lands occupied by the town as they have not suffered through their own *laches* to be sold to *bona fide* settlers by the Land Department under laws of Congress.

Having referred to all the general laws of Congress relating to the public lands in Utah, counsel now proceeds to give the terms of the various town-site acts of Congress. They were enacted as follows: May 23, 1844 (5 Statutes at Large, 657); July 1, 1864 (13 *Ib.*, 343); March 3, 1865 (*Ib.*, 529); March 2, 1867 (14 *Ib.*, 541); June 8,

1868 (15 *Ib.*, 67); March 3, 1877 (19 *Ib.*, 392). The following is the text of the law of 1864, relating to town-sites, so much of it as is material here:

"SEC. 2. * * That in any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it shall and may be lawful for them to cause to be filed with the recorder for the county in which the same is situated a plat thereof for not exceeding 640 acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed, also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall not exceed 4,200 square feet, with a statement of the extent and general character of the improvements; the said map and statement to be verified under oath by the party acting for, and in behalf of, the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the General Land Office a verified transcript of such map and statement, accompanied by the statement of two witnesses that such city or town has been established in good faith; and when the premises are within the limits of an organized land district a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the General Land Office it shall and may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of $10 for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at said minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least 3 months' notice, in view of the increase or decrease in the value of the municipal property: *Provided*, That any actual settler upon any one lot, as aforesaid, and upon any additional lot in which he may have substantial improvements, shall be entitled to prove up and purchase the same as a pre-emption at said minimum at any time before the day fixed for the public sale.

"SEC. 3. * * * and patents for all lots so disposed of at public or private sale shall issue as in ordinary cases."

Section 4 provides that if the maps and statement provided for in section 2 are not filed in 12 months the Secretary of the Interior may cause a survey and plat of the city to be made and the lots sold at an increase of 50 per centum on the minimum price of each lot.

Section 5 allows the Secretary to make all necessary regulations, and it repeals the act of 1844.

The act of 1865 so amended the act of 1864 as to make the latter effective where the town lots were variant in size and the town covered an area greater than 640 acres. The acts of 1844 and 1867 in some respects are identical. The latter was based upon the former. To show this, the material portion of each act is given herewith:

The act of 1844.

* * "That whenever any portion of the *surveyed* public lands *has* been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful in case such town *or place* shall be incorporated, for the corporate authorities thereof, and if not incorporated for the judges of the county court for the county in which such town may be situated, to enter at the proper land office and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated: *Provided*, That the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such *land* as is actually occupied by the town, and be made in conformity to the legal subdivisions of the public lands authorized by the act of twenty-fourth April, 1820, and *shall not in the whole exceed* 320 acres: *And provided also*, That any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void *and of none effect*." * * *

The act of 1867.

* * * "That whenever any portion of the public lands [of the United States] *have* been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the [agricultural] pre-emption laws, it shall be lawful in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated for the *judge* of the county court for the county in which such town may be situated, to enter at the proper land office and at the minimum price, the land so settled

and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated: *Provided*, That the entry of the land intended by this act [to] be made [shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town site under this act shall be filed with the register of the proper land office] prior to the commencement of the public sale of the body of land in which it is included, and that the entry [or declaratory statement] shall include only such *lands* as is actually occupied by the town and [the title to which is in the United States. If upon surveyed lands the entry shall in its exterior limits] be made in conformity to the legal subdivisions of the public lands authorized by the act of 24th April, 1820, and [when the inhabitants are in number 100 and less than 200] shall *embrace not exceeding* 320 acres [and in cases when the inhabitants of such town are more than 200 and less 1,000 shall embrace not exceeding 640 acres; and when the number of inhabitants is 1,000 and over 1,000, shall embrace not exceeding 1,280 acres: *Provided*, That for each additional 1,000 inhabitants, not exceeding 5,000 in all, a further grant of 320 acres shall be allowed: *And provided further*, That in any Territory in which a land office may not have been established, declaratory statements as hereinbefore provided may be filed with the surveyor general of the surveying district in which the lands are situate, who shall transmit said declaratory statement to the General Land Office]: *And provided* [*further*], That any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void; [effect to be given to the foregoing provisions according to such regulations as may be prescribed by the Secretary of the Interior." * * *]

The remainder of the act states to what excepted lands the act shall not apply.

The act of 1868 amends the act of 1867 by providing that parties who avail themselves of the act of 1867 shall pay for the surveying and platting of the town-site and the expenses incident thereto incurred by the United States, before any patent shall issue therefore.

The rules and regulations governing the execution of the trust in town-site cases were embodied in an act of the legislature of Utah, approved February 17, 1869, and an amendatory act approved February 18, 1876. (Compiled laws of Utah, 379, 385.)

Under the law of 1844 the area of town-sites was clearly limited to such land as was actually occupied by the town for the purposes of trade and not agriculture. (1 Lester, 431, 437, 441.)

But under the law of 1867 the department has held, liberally and rightfully, that it is not necessary for all the land to be actually occupied, to which a town exceeding 100 inhabitants may be entitled for the purposes of trade, in order to remove it from the operation of the pre-emption and homestead laws. Slossen *vs.* Price, Copp's Public Land Laws, 689; Town of Concordia *vs.* Linney *et al.*, 3 Copp's Land Owner (July 1876), 51.

Although in construing the term "selected as the site of a city," the appellant is apparently concluded by the decision of the Secretary of the Interior in city of Bismarck *v.* Hackett *et al.*, 3 Copp's Land Owner (Sept, 1876), 87, counsel thinks that a point to be raised here was not considered in that case. It was there held that selection, settlement, and occupancy were the successive steps necessary to be taken to obtain title to a town site. But here it is respectfully urged that another very important step was necessary, inasmuch as the authorities of Grantsville chose to assert title to government land under a Territorial act of incorporation instead of under the town-site acts of Congress.

Under the 2d section of the act of 1864, it was necessary for her authorities to give notice to the United States of what land they might desire, sometime thereafter, to have patented as a town site.

They might at any time before a sale of the body of the land apply to enter a town site; if they chose to wait, the United States would not object. "But," said the government, through its Congress, "give notice of what land you want, file a plat of it with your county recorder, and he shall send a verified copy of the plat to the Commissioner of the General Land Office, so that no man can make a preemption or a homestead upon the land included upon the plat." That Congressional act was notice to the several States and Territories not to make incorporations of cities larger than the plat ordered to be filed by the law of 1864. That law is still in force. What is the effect of not having filed a plat? This—the government has no notice of what land a city desires to select, neither has the settler. The settler sees his neighbor make an entry at the land office and perfect his title, because no opposition is offered to such entry, and so he naturally pursues the same course. But the city authorities interpose at the land office, and say, "You cannot have a patent. We select your land as a site for our city, although we are not obliged to move before the land is offered at public sale." On the other hand, the land office having no plat to guide it, pays

no attention to the Territorial act of incorporation, but issues its patents the same as in the case at bar. The city acquiesces because the settlers are "desirable" members of society, who will work in harmony with that religious element which has ever moved the Mormon people to act together for their common good.

It seems, though, that Brother McBride is not an acceptable acquisition to the community of Grantsville, and hence this contest to defeat his settlement, entry, and patent. The city authorities in effect attempt here to lay a *floating grant* over our beloved brother. We submit that this is not right.

We hear of no trade, "commerce, or manufactures" within the city of Grantsville; we read only of small farmers and gardeners. Is that a city? If 1,000 men should go upon the public lands to raise strawberries and watermelons on 5-acre lots, would your honor call that a city? Would it be any more a city because they might have a public hall, co-operative store, 2 blacksmith shops, and a private school-house; especially when there are no taxes raised for municipal purposes? Taxes are of the very life-blood of every form of government. Without a railroad, canal, or telegraph; with no banks, counting-houses, or exchanges; without furnaces or manufactories, elevators or warehouses; with no public schools, or public buildings, or water works, or lighted and paved streets; but where the "streets" (on paper) are serpentine wagon-trails, which run through sage-brush so high that a man can hide in it, we find ourselves contending here for our patent against an *incorporated* city!

As to whether Grantsville should now be permitted to "float over" upon McBride's land, is it so near to the city that it could be rightfully subjected to city taxation?

Legislation which subjected land to city taxation was declared unconstitutional:

1st. Land used for farming purposes, located a mile from any land laid out as town lots or used as town property. Morford *vs.* Weger, 8 Iowa (1859), 82.

2d. Land not needed for or used as city property. Langworthy *vs.* City of Dubuque, 13 *Ib.* (1862), 86.

3d. Sixteen acres of land within 26 rods on one side and 90 on the other of improvements, and when the city had been built up on each side and beyond it. But no streets had been opened to it and it had been used exclusively for farming purposes. Fuller *vs.* The city of Davenport, 17 *Ib.* (1864), 404.

4th. Land 2 miles from the settled portion of Omaha, and one mile from any land improved or occupied as town lots (but within the incorporation) and used exclusively for farming purposes. No streets and no house nearer than a mile. Bradshaw *vs.* The city of Omaha, 1 Nebraska, 47.

As to the rights of Grantsville, here is good law, applicable to the case at bar. Said Chief Justice Emmett, in 1861: "As a matter of law, we hold * * * that 'the rights of parties as they existed at the time of the entry' depend upon and are controlled by the rights of parties as they existed at the time that the act of Congress was shown to have been complied with." Castner *vs.* Gunther, 6 Minn., 119.

It is submitted that at no time since the initiation of McBride's entry have the authorities of Grantsville complied with the acts of Congress governing this contest. McBride's entry was initiated in 1869. The Commissioner erred in holding that the application of the mayor to the register at Salt Lake City to file an application for a town-site patent was a notice to McBride that the authorities of Grantsville desired to "appropriate" his land.

1st. Because McBride's rights had vested by the prior issue of his patent.

2nd. Because the law of Congress, of 1864, provided that cities should give notice of the land required for municipal purposes by the filing of a plat—not by an act of incorporation. The Commissioner has charged that McBride has cultivated only 15 acres of his entry. We answer that he was not bound to cultivate the whole of it. Opinion of Cushing, 7 Opinions of the Attorney-General, 740.

When McBride made his entry Grantsville had not exceeding 755 people. A plat for that city then could have rightfully included but 640 acres. As the city grew it could give additional notice by the filing of additional plats. The law did not preclude it from filing more than one plat, but the filing of a plat, to show what land was desired for the site of the city, was the first act required as a proper notice both to settlers and to the United States.

And here arises a very serious objection to the claim of the mayor of Grantsville. He is not a party to this case. True he does not appear so, but he succeeded in getting the Commissioner to style this case the city of Grantsville *vs.* Thos. McBride. Counsel most respectfully maintains that the city is not a party to this contest, and it cannot become a party until her authorities have filed an application for a town-site patent with the Commissioner. Suppose that A was about to be granted a patent for an invention, and that B should attempt to resist its issue by writing a letter to the Commissioner of Patents claiming that he was the first inventor, while A was not. The Commissioner would at once answer "You are not a party—you cannot become a party until you file an application. Then I can know respectively the claim of both parties."

Here we do not know the claim of the city of Grantsville, for it never has been made

known either by a plat or by a declaratory statement. Her authorities coolly ask here that McBride's patent shall be cancelled so that the city can include it in an application for a town-site patent. That is not a proper proceeding. They must come here as does the appellant with certain specified claims, whereupon the department will proceed to adjudicate upon them. This was one reason why the town-site contest of Laramie did not prevail against a settler. 4 Copp's Land Owner (December, 1877), 133. Upon this point counsel did not choose to make any demurrer before the Commissioner—he chose to submit his case without argument; and he is well aware that exceptions are not taken on appeal, but in the first instance. But he says that this is not a fair fight, and no injustice has been done by reserving his opinion upon this point, for it should have been patent to the Commissioner without my showing; if he chose to consider such a contest as this, and under the circumstances here shown, *without the proper parties*, the counsel upon the other side, in whose favor he decided, should make any necessary apology. For this oversight upon such a preliminary point, we venture to say that if the Commissioner will relieve his cabinet and assume a little more responsibility in the rendering of decisions, we may have good cause to be devoutly thankful for the results which can yet be effected for the good of the country.

Counsel repeats, the city of Grantsville is not legally a party to this case, and she cannot sue for the land here in controversy, because her authorities have not claimed it in the manner pointed out by the statutes of Congress, and it is submitted that those statutes have precedence over the acts of the State of Deseret.

Considering that 31 other patents have already been granted for land within the incorporated limits of Grantsville, we think that her authorities are displaying, at this late day, a good deal of questionable public enterprise by urging a cancellation of McBride's patent.

Description of the 44 entries within the limits of Grantsville.

	Pre-emption entry.	Scrip.	Homestead entry.	Other entries.	Final certificate.	Patentee.	Date of patent.
1	936	.....	.....	.....	.....	Alfred Read	June 10, 1873
2	1, 278	.....	.....	.....	.....	Swan Erickson	Sept. 25, 1874
3	.....	.....	2, 297	.....	.....	James James, jr	.....
4	.....	.....	2, 494	.....	.....	Wm. G. Stewart	.....
5	.....	.....	.....	.....	.....	A. G. Johnson	.....
6	678	.....	.....	.....	.....	Wm. Matthews	May 1, 1872
7	607	.....	.....	.....	.....	A. H. Hale	Sept. 30, 1871
8	46	6, 161	.....	.....	.....	Wm. M. Pope	April 15, 1875
9	321	1, 139	.....	.....	.....	Joseph Everill	Nov. 5, 1874
10	1, 046	.....	.....	.....	.....	Saml. W. House	July 1, 1873
11	.....	.....	1, 677	.....	941	A. L. Hale*	Aug. 6, 1878
12	145	1, 700	.....	.....	.....	B. F. Barrus	Apr. 15, 1872
13	.....	.....	1, 671	.....	838	A. H. Hale*	Aug. 6, 1878
14	675	.....	.....	.....	.....	William Green	May 1, 1872
15	75	364	.....	.....	.....	Wm. Lee	Apr. 15, 1872
16	27	539	.....	.....	.....	Eleazer Barrus	June 15, 1871
17	205	662	.....	.....	.....	Joseph Rowberry	Sept. 2, 01872
18	.....	.....	381	.....	151	Thos. McBride	Sept. 26, 1877
19	263	324	.....	.....	.....	Andrew Anderson	July 1, 1875
20	54	1 573	.....	.....	.....	Edward Hunter, jr	Apr. 15, 1872
21	55	1, 574	.....	.....	.....	Hyrum Booth	Apr. 15, 1872
22	.....	.....	267	.....	326	James M. Worthington	June 15, 1875
23	.....	.....	3, 959	.....	.....	Jonas Anderson	.....
24	.....	.....	2, 193	.....	.....	Anders Niesson	.....
25	440	961	.....	.....	.....	Wm. C. Martindale	Aug. 8, 1873
26	.....	.....	.....	Desert (141)	.....	Wm. M. Rydalch	.....
27	.....	.....	432	.....	.....	Joshua R. Clark	Mar. 5, 1875
28	.....	.....	.....	Timber (9)	.....	John W. Cooley	.....
29	.....	.....	646	.....	293	Saml. W. Wooley	March 5, 1875
30	1, 494	.....	.....	.....	.....	Nancy J. P. Hunt*	Aug. 6, 1878
31	.....	.....	.....	Timber (8)	.....	Theo. Burmester	.....
32	.....	.....	2, 949	Cash (1814)	.....	Leonard C. Lee*	Aug. 6, 1878
33	.....	.....	2, 920	.....	.....	Theo. Burmester	.....
34	113	219	.....	.....	.....	John M. Clark	April 15, 1872
35	.....	.....	2, 065	Cash (1488)	.....	Saml. L. Baker*	Jan'y 4, 1878
36	.....	.....	.....	Desert (10)	.....	W. C. Rydalch	.....
37	270	.....	.....	.....	.....	W. C. Rydalch	Apr. 25, 1871
38	.....	.....	629	.....	235	W. C. Rydalch	Dec. 1, 1874
39	.....	.....	2, 888	.....	.....	Stephen J. Worthington	.....
40	.....	.....	182	.....	26	Harrison Severe	Dec. 1, 1874
41	.....	.....	.....	Warrant (91114)	.....	John W. Cooley	July 19, 1870
42	81	370	.....	.....	.....	James McBride	April 15, 1872
43	949	.....	.....	.....	.....	Thos. H. Clark	June 20, 1874
44	.....	.....	3, 667	.....	.....	Elam W. McBride	.....

*McBride's patent recalled Dec. 19, 1877; 5 entries patented since then, or 800 acres.

Section.	Patented.	Entered.	Filings.	Clear.
Sec. 20			80	560
19	280		120	240
24	160	320		160
23	520	80		40
26	160	320		160
25	640			
30	480	80		80
29	240		40	360
25				640
36	240			400
31	640			
32	480		160	
5	520	40	80	
6	240	240		160
1			160	480
2		160		480
11				640
12			40	600
7	40	40		560
8				640
Parts of sections	Eastern boundary	400*	120	280
Do	West'n 40 do			760
	4,680	1,680	800	7,240

*Includes 240 acres selected for university.

Total area of Grantsville		14,400 acres.
Patented	4,680	acres.
Entered	1,680	do.
Filed on	800	do.
Clear	7,240	do.

City of Grantsville *vs.* Samuel L. Baker.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 4, 1877.

REGISTER AND RECEIVER,
Salt Lake City, Utah T'y:

GENTLEMEN: In the matter of the conflicting claims of the town of Grantsville and Samuel L. Baker to NE.¼ NW.¼. sec. 25, SW.¼ SE.¼ and SE.¼ SW.¼ sec. 24, T. 2 S., R. 6 W., this office has examined the affidavits and other papers on file in this office, and finds as follows:

The tracts described were incorporated as a part of the town of Grantsville by an act of the legislature of Utah Territory approved January 12th, 1867.

Mr. Baker made homestead entry No. 2065 on said tracts October 9, 1874, and commuted the same to cash entry No. 1488 August 28, 1875.

More than 20 square miles are embraced in the corporate limits of said town, and the town proper is located about one mile from the land in question, on part of section 36, T. 2, S. R. 6 W., entered under the pre-emption law by various parties, who have received patents therefor. The whole of section 25 lies between the claim of Baker and the town of Grantsville; and portions of this section have also been patented to pre-emptors and homestead claimants. It is not claimed, nor does it appear, that any part of the land entered by Baker was ever used or settled upon for municipal purposes. The parties claiming this land have fenced portions of the same, and have used it for pasturage or hay land for a number of years. These persons allege that they are residents of Grantsville, but show no residence on the land in question. It appears from our records that several of these parties have made entries under the pre-emption and homestead laws for lands within the limits of said town, and have received patents therefor. Mr. Baker pleads duress, and alleges that he was prevented from fully complying with the law by threats and violence. He shows, however, a residence from April 28, 1875, to date of commutation, a cultivation of 107 acres, a half mile of water ditching, &c.

It is provided in the act of March 3d, 1877 (pamphlet ed., page 392 of U. S. Statutes), that these entries have been "heretofore allowed upon lands afterward ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown to the satisfaction of the Commissioner of the General Land Office to include only vacant unoccupied lands of the United States, not settled upon

or used for municipal purposes nor devoted to any public use of such town; said entries, if regular in all respects, are hereby confirmed and may be carried into patent."

In this case it is shown to the satisfaction of this office that no part of Baker's claim has ever been used for municipal purposes, and therefore the entry made by him covering said land is confirmed by the act referred to, and will be carried into patent as therein provided for.

Advise the parties in interest, and allow sixty days from the date of your notice for appeal.

Notify this office of the action taken in this case, and refer to this letter as G by date.

Respectfully,

J. A. WILLIAMSON,
Commissioner.

. The glaring inconsistencies of this case manifest upon the face of the record are too serious to pass unnoticed.

The incorporation of Grantsville covers 14,400 acres. More than one-half its area, or 7,160 acres, is covered with entries. The town proper stands upon a school section. Of the 44 entries, 2 of them for patented land in the very heart of the town, all but 12 entries have been patented. The diagram shows that the *situs* of Grantsville is entirely upon land which has been patented to individuals.* The Commissioner recalled McBride's patent December 20th, 1877. Since then he has issued and delivered patents for 800 acres within the incorporated limits of Grantsville. Upon one of these entries, that of Samuel L. Baker, lying one mile (?) north of the town proper, there was a contest. That patent did not slide through without his notice. His decision there shows that there were no municipal improvements upon the land, an admission which he made in the McBride decision. There he permitted an entry, contested by parties in behalf of the city, to ripen into a patent. Here, on the contrary, he holds a patented entry for cancellation, and both are within the limits of the corporation. There he patented a commuted homestead; here he attempts to cancel a patent for a homestead, which became perfect only after the lapse of years, and the performance by McBride of every act required by law to make it good. Here he attempts to destroy a muniment of title upon the alleged ground that it was void at its inception. How about the Baker entry? How about the four other patents within the limits of Grantsville issued as late as August 6th, 1878? How can he issue a patent to Baker (assuming that it was not contested by the city) after recalling McBride's patent, and consistently hold for cancellation a year afterward this patent to McBride, after he had lived on his land 17 years and, unopposed by anybody, had completed every act of the several legal steps which constitute his chain of title? His entry was not commuted, nor was it paid for on the day he made it. Openly, and for a series of years, McBride prosecuted his rights before the land-office? Ten years have now gone by since he made his entry. The Commissioner admitted that in 1869 there were no municipal improvements upon McBride's land, nor any adverse possession by actual residents. Therefore, McBride had a right to make his entry. The intrusion of adverse occupants since then cannot affect his rights. He has performed the last act required of him to perfect his rights, and he therefore becomes entitled to preference. The city of Grantsville has been guilty of laches. She has not yet performed even the first act to acquire a preference. (Shepley *vs.* Cowan, 1 Otto, 340.)

The administration of the affairs of the land-office, so far as they concern the people of Grantsville, partakes of that reputation so aptly described by Mr. Justice Miller in the case of Moore *vs.* Robbins. To the fluctuations manifest in the Baker decision and in the case at bar, counsel has only to add that he hopes the law will be pronounced here with a force and strength that will save your honor's decision from reversal for at least a period of 20 months. However reluctant your honor may be to overturn the decisions of a bureau officer, it is insisted that one of these decisions is right, while the other is wrong. They cannot both stand, and one of them must fall. We seriously ask your honor to direct the Commissioner of the General Land Office to report by what authority he issued patents for 800 acres of laad within the city limits of Grantsville after recalling the McBride patent. We do not wish this department to be subject to an imputation from the general public that its affairs are administered either through fraud, carelessness or incompetency.

Patents may slip through innocently and unadvisedly even with a most watchful Commissioner; but the promulgation of decisions in land cases repugnant to each other, we respectfully submit is quite another thing. We venture to say that if your honor will glance over the decisions of the late Commissioner Fisher, of the Patent Office, a consistency may be found there which can be infused with profit into every branch of the Interior Department.

*Since McBride's patent was canceled October 10, 1879, the authorities of Grantsville have filed an application for a town-site patent. It is for land upon which the alleged *city* does not stand, includes McBride's land, and embraces 960 acres. The register of the United States land office at Salt Lake City has, in an official report transmitting the application, denounced it as a gross fraud.

As to the act of Congress of March 3d, 1877, limiting the area of town sites upon the public domain, especially in the Territory of Utah, we offer now no argument to show that that remedial act validates the entry and patent of McBride. The appellant still feels that he can get along without it. If opposing counsel endeavor here to make any forced construction of it against the patent, the appellant's counsel will appear in good time to answer any material averments affecting the validity of his patent.

In conclusion, we have no apology to make for the length of this argument. We surmise that opposing counsel will say that all that has been written here about interfering with the primary disposal of soil, and the power of the Territories, under acts of Congress to create corporations, is not material to the issue here. But your honor may hold otherwise; and so at the expense of brevity we offer the opportunity, trustful that the research of counsel upon these important and interesting questions will not be deemed an intrusion upon the time of the officers of the department.

Respectfully submitted.

JAMES H. MANDEVILLE,
Of Counsel.

To Hon. CARL SCHURZ,
Secretary of the Interior.

3

James H. Mandeville
Counsel for the
Plaintiff in Error
in the Supreme Court of
the United States.

OFFICE SUPREME COURT U. S.
FILED
OCT 6 1880
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

October Term, 1880.

THE UNITED STATES
ex rel. THOMAS McBRIDE,
vs.
CARL SCHURZ,
Secretary of the Interior.

No. 707.

WALTER H. SMITH,
Of Counsel for Relator.

R. O. POLKINHORN, PRINTER.

UNITED STATES SUPREME COURT.

October Term, 1880.

THE UNITED STATES
ex rel. THOMAS MCBRIDE,
vs.
CARL SCHURZ,
Secretary of the Interior.

No. 707.

Statement of Fact.

This is a petition for a mandamus. It was filed in the Supreme Court of the District of Columbia on the 11th of October, A. D. 1879, and alleges that the relator was, in 1862, possessed of all the qualifications necessary to entitle him to preempt 160 acres of the public lands of the United States. That he did, in that year, settle upon the following public lands, to wit: the south half of N. E. quarter and lots 1 and 2 of section 6, T. 3, south of range 5 W., in the county of Tooele and Territory of Utah, containing a little less than 160 acres, with the intention of appropriating said lands under the public land laws of the United States; that he soon thereafter erected a dwelling thereon and has thence continuously inhabited, occupied and cultivated said premises; that on the 31st of May, 1869, he, in due form of law and in

due time, made a homestead entry of the same at the land office in Salt Lake City; that after occupying, cultivating and residing upon said lands for more than five years after said entry, he did, on the 15th of June, 1874, make due proof of the same, pay the fees, and receive a final certificate therefor; that his said proofs and papers were duly forwarded to the Commissioner of the General Land Office, and were

"found by him to be in all respects in compliance with law, and such as to justify and require that a patent should be issued to him for the said homestead premises;"

that in accordance with said finding a patent for said lands was, on the 26th day of September, 1877, duly signed by R. B. Hayes, President of the United States, countersigned by S, W. Clark, recorder of the General Land Office, and duly recorded in book 2, page 87 of the land records of the United States for the land district of Utah Territory; that said patent was afterwards, and on the 3d of October, 1877, transmitted by the Commissioner to the local officers at Salt Lake City, with instructions to deliver the same to petitioner, and was received by them; that petitioner appeared at said land office and demanded that said patent should be delivered to him; that the local officers refused to deliver it because they had been instructed by the Commissioner, on the 14th of October, 1878, to return the said patent to him; that the patent was returned to the Commissioner on the 22d day of October, 1878, and that the same was then in the Department of the Interior, subject to the control of the Secretary of the Interior; that Carl Schurz is such

Secretary, and that petitioner, on the 6th of October, 1879, demanded of him, at his office in the Department of the Interior, the delivery of said patent, but the said Secretary, on the 10th of October, 1879, absolutely refused to deliver the same. The petitioner prayed that the writ of mandamus might issue, and that the respondent might be directed to deliver to him said patent.

The agreed statement, (transcript page 23,) shows that all the allegations of this petition were admitted to be true, except the one that said premises were, in 1862, subject to preemption entry.

The petitioner afterwards, and on the 21st of October, 1879, by leave of the court' filed a supplemental petition, in which he alleged, that on the 10th of October 1879, the said patent was cancelled by having written across the face of it the words "Cancelled by letter G, dated October 10, 1879, S. W. Clark, Recorder G. L. O." and that the record of the patent was cancelled at the same time and in like manner; and that at the same date the local officers were instructed to cancel the entry of the relator; that the orders for said cancellations were given by the said Carl Schurz, and, as petitioner believed, executed after he demanded his patent of the respondent and before his refusal to deliver the same ,and, therefore, before he had a right to commence proceedings in mandamus.

The petitioner prayed that the respondent might be directed to restore the patent and record to the condition they were severally in before said cancellations.

The respondent filed his answer on the 24th of October, 1879, in which he alleged that the relator was not entitled to said patent, because the lands claimed by him were, at the time of his entry, within the incorporated limits of the City of Grantsville.

Assignment of Error.

The court below erred in not issuing the writ of mandamus as prayed for by the relator.

Brief.

The case has been so fully argued by my associate Mr. Mandeville, that I shall not take up much time upon the points that he has considered.

I do not deem it necessary to cite authorities to show that mandamus is the proper remedy for the relator and that it may issue, against a cabinet officer, in a proper case.

I agree that while discretion and judgment remain to be exercised, they cannot be controlled by the writ of mandamus, but I claim that such discretion and judgment ended as soon as title vested in McBride, and that title did vest in him at the very moment that the patent was duly executed and recorded, and that delivery of the patent was not necessary.

Phillips Lessee vs. *Irwin*, 1 Tenn., 235;
Green vs. *Liter*, 8 Cranch, 247;
Cunningham vs. *Browning*, 1 Bland, 304;
Steele vs. *Lowry*, 4 Ohio, 72;
Enfield vs. *Pennit*, 8 N. H., 515;
La Peyre vs. *U. S.*, 17 Wallace, 191;

LeRoy vs. *Clayton*, 2 Sawyer, 496;
LeRoy vs. *Jamison*, 3 Ib., 391;
Marbury vs. *Madison*, 1 Cranch, 137;
Lavergnes Heirs vs. *Elkin*, 17 La., 227;
Mitchell vs. *Ryan*, 3 Ohio State, 387;
Donner vs. *Palmer*, 31 Cal., 547;
Chipley vs. *Farris*, 45 Ib., 539;
Miller vs. *Ellis*, 57 Ib., 73;
People vs. *Livingston*, 8 Barb., 255;
Smalley vs. *McLain*, 14 Ga., 254;
Willis vs. *Jermin*, Cro. Eliz., 167;
Ex parte, *Beck*, 1 Bro. C. C., 578;
Ex parte Koop, 6 Ves., 599;
Leighton's case, 2 Vern., 173;
Slingsley's case, 3 Swanst., 178, note;
O'Reilly's case, 1 Ves. Jr., 112;
Exparte Buktman, 3 Rich. Eq., 257;
3 *Opinions Atty. Genl.*, 654;
Bacon's Abr. title Pre. F. 2, *Blk. Comm.*, 344;
3 *Washburn Real Prop.*, 520;
1 *Cov. and Hughes*, 738.

In view of these authorities it is difficult to see how this court can possibly hold that delivery was essential to the passing of title; but if the court should be of that opinion, then the delivery of the patent to the register of the land office for the relator was sufficient.

Gannon vs. *Knight*, 12 E, Com. Law, 351;
Morrel vs. *Swift*, 18 Com., 257;
Church vs. *Gilman*, 15 Wend. 656;
Mitchell vs. *Greene*, 3 Ohio State, 377.

This last case is exceedingly strong, and the attention of the court is particularly invited to it.

An examination of the Rev. Statutes, sections 2234–2247 inclusive, will show that the register of the land office is an independent officer, and does not act under the direction or control of the Commissioner in the matter of the delivery of patents. He is the agent of the applicant rather than of the Commissioner. A delivery to him for the patentee is as effectual as a delivery to the President would be for that purpose. There is no difference in the two cases except the President is at the summit and the register at the base in the proceedings to procure land titles.

I cannot dismiss this subject of delivery without calling the attention of the court to the consequences of holding that delivery is essential to vesting title.

There are now, as I learn from the Recorder of the General Land Office, nearly half a million of patents in the general land and local offices that have been duly issued and recorded, running back in date to the foundation of the Government. These lands are, many of them of great value, and have been conveyed time and time again. Where is the legal title to them? Can it be that it is still in the United States, and that the universal impression of the legal profession that a patent need not be delivered, is erroneous? Take the case of a patent being destroyed by fire before delivery. What can the patentee do to protect himself? He cannot procure a duplicate patent. There is no authority in law for issuing such an instrument. He may procure an exemplification

of the record, but this court has held in the case of *McGarrahan* vs. *Mining Co.*, 96 U. S. 316, that the same defence may be made to the exemplification of the record that might be made to the patent itself; and if non-delivery of the patent would defeat a recovery in ejectment in the one case it would in the other. How, then, could such a party, out of possession, recover the same?

I can see no remedy for him except to go to Congress and get a special act passed for his relief. It can hardly be that a construction which would lead to such consequences will commend itself to this court.

I have thus far considered only abstract questions of law touching this case. I now propose to show that, upon the merits, McBride was entitled to his patent, if that question can ever be reached upon the case made by the record.

The agreed statement (p. 23 record) shows just what was before the court. It contains all the evidence that was given by either party, and from that statement it appears that the defendent gave *no proof whatever.*

There were replications filed to his several answers, and, under the rule of the court below, (which is set out in the agreed statement), that put him upon proof of his entire defence.

The only point upon which there was any agreement or evidence was the admission that the incorporated town of Grantsville, set forth in the answer, was, in fact, the incorporated city of Grantsville, as incorporated by the Territorial Legislature of Utah,

Jan. 12, 1867, and that said act should be treated as a part of the case.

It certainly was the duty of the defendant, below, to make out his case by proof. The issues of fact, when controverted, were to be made out as in other cases. He saw fit to go to a hearing without any such proof, and he is now without any legal excuse or defence for not delivering our patent. This is his legal status.

But if this court, in view of the range that has been taken in argument by my associate, shall be of the opinion that it may properly consider the matter set up in justification by the respondent, then I claim that McBride was entitled to his patent upon the merits.

1st. Because he settled as a preemptor in 1862, and long before the city of Grantsville was incorporated, (Jan. 12, 1867), and being first in time he was first in right.

Shepley vs. *Cowen*, 91 U. S., 337.

The agreed statement shows that *he settled* in 1862 with the intention of appropriating the land under the public land laws, and had continued to reside on and cultivate it up to the time of filing his petition.

If he had filed as a preemptor, his right would have been considered as initiated at the time of his settlement. He had his election to file as a preemptor or make a homestead entry. If he had adopted the former course, he would have been protected. Ought he not to be equally protected if he adopted the latter? The respondent held that he would not be, because the entry is the initiation of a homestead right.

I do not concur in that view. It seems to me that the homestead act was intended to enlarge the rights of the early settler, and that it should be liberally construed and in such a way as to save, rather than destroy, rights acquired by settlement. It would be cruel to deprive an unlearned pioneer of his land, because, having two courses pointed out by law by which he might acquire his home, he selected the one rather than the other.

Moreover the 6th section of the homestead act, passed May 20 1862, 12 stat. 393, expressly saved all preemption rights existing at the time it took effect Jan'y 1, 1863. It said:

> *Provided*, "That nothing contained in this act shall be so construed as to impair or interfere, *in any manner whatever*, with existing preemption rights."

McBride's rights then existed. He had settled in 1862, with the intention of appropriating the land under the public land laws, and as preemption was the only way of acquiring the land at that date, he must have settled as a preemptor. The land was public land, It had been surveyed in 1856. It was acquired from Mexico, and the Indian title was extinct. It was made public land by the 17th section of the act of Sept. 9, 1856, 9 Stat. 458, which extended over the Territory of Utah, the Constitution and laws of the United States, so far as the same were applicable.

It was recognized as public land by the 2nd section of the act of July 16, 1868, 15 Stat. 91, which provided:

"That the public lands of the United States within said Territory of Utah, shall constitute a new land district to be called the "Utah District."

I have not overlooked the case of *Stark* vs. *Starrs*, 6 Wall, 402. That case was decided upon the peculiar local land laws and condition of titles that had obtained in Oregon. No such state of things existed in Utah, and, therefore, that decision is not controlling. The reason ceasing, the rule ceases.

2d. McBride was entitled to his patent, because his rights were saved by the act of March 3, 1877, 19 Stat., 392.

This act took effect before the hearing was ordered, or had, between the City of Grantsville and McBride. It was passed to prevent cities from incorporating large tracts in excess of what they were entitled to under the town site laws, and provided that such incorporation should not exclude lands from preemption or homestead entry in excess of 2500 acres, unless such excess shall "*be actually settled upon, inhabited, improved, and used for business and municipal purposes.*" There is no pretense that McBride's land was thus actually settled upon, or inhabited, or improved, or used for business or municipal purposes; but the contrary was shown. He was therefore within the terms of the act. It is a remedial act and should be liberally construed, and might properly be held to apply to an entry perfected by patent before the passage of the act, when the controversy arose after its passage.

His rights were also protected by the 2d section of that act which provided:

"That where entries have been heretofore allowed upon lands afterwards ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown to the satisfaction of the Commissioner of the general land office, to include only vacant and unoccupied lands of the United States, not settled upon or used for municipal purposes nor devoted to any public use of such town, said entries, if regular in all respects, *are hereby confirmed*, and may be carried into patent."

If an entry would be confirmed under such circumstances, *a fortiori*, a patent would be. McBride was clearly included in the spirit of this section. He had made an entry and carried it to patent and it had afterwards been discovered, by the general land office, that his land was included within the limits of the incorporated City of Grantsville. His land was not settled upon or used for municipal purposes nor devoted to any public use of the town. Why was his title not confirmed?

3. He was entitled to his patent because his land was not excluded from preemption settlement by the act of March 4, 1841, 5 Stat., 453, commonly called the preemption act.

That act provided, section 10, page 456, as follows:

"No sections or fractions of sections included within the limits of an incorporated town; no portions of the public lands which have been selected as the site of a city or town shall be liable to entry under and by virtue of the provisions of this act."

I wish to call special attention to the language here

employed, and to the distinction that is made between a town and a city. In the case of a town, the mere fact that lands are included within its incorporated limits excludes them from preemption, but in the case of a city, the lands must have been "*selected*" as the site of a city. How selected? Manifestly in the manner that was then or should be thereafter pointed out by law. In construing a statute the words used should receive their ordinary acceptation, unless a different signification is apparent from the context.

In this statute both words town and city are used. They do not ordinarily have the same signification. As generally understood the word town signifies a collection of houses covering a small area. The word city a collection of houses covering a large area. I think it is used in that sense in this statute, and being thus used, Congress might well say that the mere fact of the incorporation of a town should exclude all lands within its limits from preemption appropriation because, at most, a small portion only of the public lands would be needed; but in case of a city it would be far different. A very large tract might be required for that purpose, and, therefore, the provision that the lands must be *selected* for the site of a city before they would be excluded from preemption settlement. The fact of selection in the manner provided by law would be notice to all parties, and would render it impossible to exclude from preemption large tracts covering thousands of acres, as was attempted by the Mormon authorities in the case of

Grantsville and the other cities which include within their limits all the valuable lands of Utah Territory. This construction frees this case from all difficulty and gets rid of the great wrong that will be inflicted upon the honest settlers of that territory, by holding that incorporation within city limits, *ipso facto*, excludes all lands from preemption or homestead entry.

In the case at bar no selection, or attempted selection even, was made by the city of Grantsville until February 24, 1877, which was long after McBride's entry was made.

How could the Commissioner of the Land Office know, in 1874, when this entry was made, that this land would be wanted by the city of Grantsville in 1877? How can he tell just where the limits of any of these Utah cities are until the lands claimed have been selected and pointed out to him by some method provided by law? It is utterly impossible for him to do it. If a city will lie by and sleep upon its rights, and take no steps to notify the land authorities of the precise limits which it claims, until years have elapsed and honest men have procured patents for their homes upon some of the lands which it might have selected, it is but the dictate of common justice and common sense that the settler should be protected, and the city loose what it might otherwise have obtained.

4th. He was entitled to his patent because the incorporation of the city of Grantsville, with an area of four-and-a-half miles square was a fraud on the law, and as such was void.

This pretended city, containing an area of over 14,000 acres, had a population, in 1870, three years after its incorporation, of 755 only. It has never exceeded 1200 inhabitants, which, underthe town-site law, would entitle it to make an entry not exceeding 1280 acres. (Rev. Stat., sec. 2,389). Why was it, in 1867, given an area of four-and-a-half miles square when it was an insignificant town? It was for the sole purpose of preventing preemption and homestead entries by settlers who were obnoxious to the Mormon authorities. It was a transparent fraud on the law. This is the first case, within my knowledge, where the effect of these enormous and outrageous incorporations of cities upon the public domain has been presented for the consideration of this court. An opportunity is now given to stamp with the disapprobation of this court all such proceedings, and to declare that they are illegal and void so far as preemption and homestead settlers are concerned.

I have not as yet been favored with a brief from the counsel of respondent, and must therefore anticipate the positions that will be taken by them.

I presume they will insist, as they did in the court below, that the Supreme Court of the District of Columbia has no power to issue a writ of mandamus. Whether it has or not, one thing is certain, that it has exercised that power continuously, and that it has never been challenged until it was done in this case.

The question, although it is not without difficulty, should nevertheless receive a response in favor of the

power. The act of February 27, 1801, 2 Stat., 103, concerning the District of Columbia, provided in its first section, that the laws of the state of Maryland then in force, should be continued in force within that part of the district ceded by that state. The third section created the Circuit Court for the district and provided that its judges should "have all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States."

The fifth section provided that the court should have jurisdiction—

> "Of all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants."

A construction was given to this statute by this court in Kendall vs. The United States, 12, Peters 524. Kendall was Post Master General, and a writ of mandamus had been issued against him by the Circuit Court of the District of Columbia. The point made was that the court had no power to issue the writ. The case was most elaborately argued and very much considered by the court, and it was held that the power did exist in the Circuit Court to issue the writ. The decision was placed on three grounds, either of which was held to be sufficient. 1st. That the common law was in force in the state of Maryland when the cession was made; that by the common law the highest court in that state had the power to issue the writ, as that court had itself decided, and

that the adoption by Congress of the laws of that state, carried with them the power and gave to the Circuit Court the right to issue the writ.

2d. That the power was given by the third section, which gave the judges all the powers given to the circuit courts; that the powers thus referred to were those specified in the act of Feb. 13, 1801.

3d. That the power was given by the fifth section, which gave jurisdiction in "all cases in law and equity." The court held that mandamus was a "case at law," and within the express words of the act. The learned judge who delivered the opinion of the court, said:

"That the proceeding on a mandamus is a case within the meaning of the act of Congress has been too often recognized in this court to require any particular notice. It is an action or suit brought in a court of justice asserting a right; and is prosecuted according to the forms of judicial proceedings."

And again:

"As to the subject-matter of jurisdiction it extends, according to the language of the act of Congress, to all cases in law and equity. This, of course, means cases of judicial cognizance. That proceedings on an application to a court of justice for a mandamus, are judicial proceedings, *cannot admit of a doubt*; *and that this is a case in law is equally clear*. It is the prosecution of a suit to enforce a right secured by a special act of Congress, requiring of the Postmaster-General the performance of a precise, definite and specific act, plainly enjoined by law."

And again:

"But, by the express terms of this act, the jurisdiction of this circuit court extends to all cases in law, &c. *No more general language could have been used. An attempt at*

specification would have weakened the force and extent of the general words 'all cases.'"

The act of March 3, 1863, 12 Stat. 763, converted the circuit court into the Supreme Court of the District of Columbia, and gave to the Supreme Court all the powers before vested in the Circuit Court. (Sections 1 and 3).

Thus the law remained until the adoption of the Revised Statutes. By the 760 section of the Rev. Stat. of the United States for the District of Columbia, it was provided that the Supreme Court shall possess the "same powers and exercise the same jurisdiction as the "Circuit Courts of the United States;" and by the 1296 section it was provided that—

"All acts of Congress passed prior to the 1st day of December, 1873, relating to the District of Columbia, any portion of which is embraced in the foregoing revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

This court had held, prior to the case of *Kendall* vs. *The United States*, and has repeatedly held since that case, that the circuit courts of the United States had no power to issue a writ of mandamus, as original process, and that its power to issue the writ was confined to proceedings in aid of cases already commenced. But it has never held that a case in mandamus is not a "case at law," or that the Supreme Court in this District has not the power to grant the writ.

According to the Kendall case it certainly has the power, if the laws of Maryland are still in force in this District, and that depends upon the question

whether the act of February 27, 1801, is repealed or in force.

Our local courts have uniformly enforced the laws of Maryland both in civil and criminal cases.

I do not feel called upon to go into an inquiry whether the last named act is repealed or not, because, as I think, the whole subject is settled by the act of Feb. 27, 1877, 19 Stat. 253, which *reenacts verbatim* the clause of the 5th section of the act of February 27, 1801, giving jurisdiction to the Supreme Court.

This was done by Congress after this court had settled that the words of the 5th section, "all cases in law," which were adopted in the new section, did give the circuit court, now supreme court, the power to issue the writ of mandamus.

This was a legislative affirmance of the construction given by this court, and is conclusive of the question; for the rule is well settled that when there is even a change in phraseology the change does not work a change in the established interpretation of the former statute, unless it *evidently* appears that such change was intended by the Legislature.

Taylor vs. *Delaney*, 2 Caine's Cases 143;
Yates, Case, 4 Johns. 359;
Douglass vs. *Howland*, 24 Wend. 45;
Gaffrey vs. *Colvill*, 6 Hill. 574;
Doremis vs. *Harrison*, 26 Ala. 326;
Moore vs. *Bemker*, 9 Foster 431;
Ash vs. *Ash*, 9 Ohio State 387.

I suppose that it will also be claimed that this suit

was brought against the wrong officer as respondent, and that it should have been brought against the Commissioner of the General Land Office instead of the Secretary of the Interior.

To this I answer that by section 441 of the Revised Statutes it is provided that—

> "The Secretary of the Interior is charged with the supervision of public business, relating to the following subject;
>
> *Second.* The public lands, including mines."
>
> By section 453 it is provided "that the Commissioner of the General Land Office shall perform, *under the direction of the Secretary of the Interior*, all executive duties appertaining to the surveying and sale of the public lands of the United States, *or in anywise respecting such public lands*, and also such as relate to private claims of land and the issuing patents for all agents (grants) of land under the authority of the government."

Stronger language could not well be used. The Secretary is made the superior authority, and without doubt, may direct and require the Commissioner to obey his orders. It would seem, therefore, that he was the proper party to apply to for the delivery of a patent in every case, but, be that as it may, he was the proper party in the McBride case, because that case was then on appeal before him, and the patent was actually in his possession. The petition alleges that "the said patent is now in the Department of the "Interior, and subject to the control of the Secretary "of the Interior." And this allegation is admitted to be true. But for fear that it might be said that the General Land Office was a part of the Department of the Interior, and that the allegation might be satisfied

by the patent being in that office, it was expressly stipulated in the agreed statement, that, at the time the demand was made, the patent was with the papers in the case on appeal before the Secretary, "and was not in the office of the Commissioner of the General Land Office. (Record, p. 23).

When the case was appealed, the whole case and every branch of it was before the Secretary. This court has determined that his "jurisdiction to revise on the appeal was necessarily coextensive with the power to adjudge by the commissioner." Maguire vs. Tyler, 1, Black. 202; and in Snyder vs. Sickles, 98, U. S., 211, it said:

> "That the Secretary, in the exercise of his supervisory powers, may lawfully set aside a survey made under a confirmed Spanish grant, and may order another to be made and *issue a patent upon it.*"

Now suppose that the demand had been made upon the Commissioner and that he had refused to deliver the patent, and this petition had been filed against him, he would have answered that the patent was not in his possession or control, at the time of the demand, but was legally in the possession of the Secretary before whom the case had been taken on appeal, and that would have been a complete and perfect defence for him. He certainly would not be required to deliver an instrument which was not in his possession, but was properly in the possession of his superior officer. This seems so clear to my mind that I will not dwell upon the point.

My examination of this case has led me to the firm

conviction that the relator is entitled to the relief prayed for; and that the mandamus should be awarded by this court and should require the respondent to restore the patent and its record to the condition they were severally in before his attempted cancellation of the same, as was done in the like case of Hollister vs. Judges, 8, Ohio State, 203, and that he should be required to deliver the patent thus restored to the relator.

I respectfully and earnestly ask that such may be the order of this honorable court.

WALTER H SMITH,
of counsel for relator.

OFFICE SUPREME COURT U. S.
FILED
SEP 13 1890
JAMES H. McKENNEY, Clerk.

IN THE SUPREME COURT

—OF—

THE UNITED STATES.

WM. ADAM, et. al., *Plfs. in Error.* v. J. R. NORRIS, et. al., *Def'ts in Error.*	No. 266.
UNITED STATES, *ex rel.* THOMAS MCBRIDE, v. CARL SCHURZ, Secretary.	No. 707.

Brief for defendants in error in No. 266, filed in No. 707, by leave of Court.

B. S. BROOKS,
JAMES K. REDINGTON,
of Counsel.

Herbert A. Gibbs, Printer.

IN THE SUPREME COURT

OF THE

UNITED STATES,

October Term, 1880.

THE UNITED STATES
ex rel. THOMAS MCBRIDE,
v.
CARL SHURZ, Secretary.

No. 707.

Brief of counsel for defendant in error in the case of Adams et. al. vs. Norris et. al., No. 266, filed in the above entitled cause by permission of the court, granted upon motion at the October Term, 1879.

STATEMENT OF FACT.

In the case at bar, the relator, Thomas McBride, claimed under the act of Congress, approved May 20th, 1862, commonly known as the Homestead Act, a certain tract of land in the Territory of Utah. After living on the land from the date of his entry, May 31, 1869, until June 15, 1874, he made due proof of five years residence, cultivation and improvement as required by said act and final certificate was thereupon issued to him by the register of the proper land office. In due course of business his claim was examined at the General Land Office, approved for patent, and a patent actually issued; that is to say the letters patent were prepared, engrossed, and signed by the proper officer; the seal of the General Land Office was affixed and the whole document, so prepared, was duly recorded in the proper record book of the General Land

Office. The patent, thus prepared, was transmitted to the register for delivery to the patentee, who, in due time, appeared and demanded the same but was refused. Subsequently the Commissioner ordered the Register to return the same to the General Land Office, which was done. The relator, who had at all times been ready and willing to accept said patent, then made formal demand on the Commissioner and Secretary of the Interior for delivery of the same but was refused. The refusal was based on supposed error of law committed in issuing the patent, the land appearing to be within the claimed incorporate limits of the town site of Grantsville, which, as was alleged, brought the claimant within the inhibition of the Homestead Act.

The relator thereupon filed his petition for *mandamus* in the Supreme Court of the District of Columbia, which was there heard and dismissed, from which judgment writ of error was sued out and the case brought into this court for review.

In the case of Adams et. al. vs. Norris et. al. No. 266, a similar state of fact is presented and a like question raised.

The defendants in error claimed title to a certain private land grant known as Gaudaloupe, situated in California, Theodore Le Roy as owner in fee and the co-defendants as his tenants.

The title of the original grantees had regularly passed to said Le Roy.

The court below found, in substance, the following state of fact.

The Mexican Nation, on the 21st day of March, 1840, granted to Teodora Arrellanes and Diego Olivera the Rancho "Gaudaloupe." The claim of the grantees was duly presented for settlement under the act of March 3d, 1851, was finally confirmed to them and in pursuance of such proceedings said rancho was surveyed by the United States

authorities. Afterwards, viz: June 30, 1866, a patent was made out and sent by the Commissioner of the General Land Office to the Surveyor General for delivery to the owner of said grant. Upon notice of this action by the land department, the then sole owner, John B. Ward, promptly refused to accept said patent on the ground that the survey upon which it was based was erroneous and not in accordance with the grant and decree of confirmation; that no legal notice of said survey, plat and approval of survey had been given and that the same was for that reason void.

Afterwards the Commissioner of the General Land Office upon the petition and with the consent of said Ward, recalled such undelivered patent and caused a new survey to be made, which was duly published under the act of July 1, 1864 (13 Stat. 232) and approved. Afterwards "such further proceedings were had that on the 1st day of March, A. D., 1870, a patent of the United States, in due and usual form in such cases, was made out in the office of the Commissioner of the General Land Office of the United States, in accordance with such survey, the seal of said office was affixed thereto, the signature of the President affixed, by J. N. Burritt, his secretary, thereto authorized by law. Said patent was duly countersigned by the Recorder of the General Land Office and duly recorded in said Land Office in Liber 7 of Records of Patents, page 289 and following pages," (Record in case No. 266 pp 16 - 17.)

The said patent, so recorded, was, by the Commissioner, forwarded by mail to the United States Surveyor General for California "to be delivered to the parties thereto entitled." Before such delivery, however, the Commissioner instructed the Surveyor General, by telegraph, not to deliver the same, but to return it to the General Land Office, which was immediately done and said patent has ever since remained in the custody of the General Land Office. The recall and return of said patent was without the

knowledge or consent of the patentees or confirmees or any successor or successors thereof.

Afterwards, May 9, 1873, Theodore Le Roy, who was then sole owner of said Gaudaloupe grant, obtained from the Commissioner of the General Land Office, under his hand and the seal of said office, an exemplified copy of said last mentioned patent, of date March 1, 1870, which said copy was duly recorded by said Le Roy in the office of the county recorder of the county where the land is situated, and upon the trial below, was introduced by the defendants as evidence of the title of said Le Roy. The demanded premises are included within the calls of this patent.

On the 29th day of December, 1844, the Mexican Nation granted to Luis Arrellanes and Eusidio Miguel Ortega, the rancho "La Punta de la Laguna." Such proceedings were had under the said act of March 3d, 1851, that the claim of said grantees was finally confirmed to them "to the extent of six square leagues;" said rancho was surveyed by the United States; said survey was confirmed and, October 2d, 1873, a patent was issued for the same. Said patent embraces the demanded premises within its calls. The plaintiffs, successors in interest to said grantees, relied upon this patent as evidence of their title.

June 12, 1873, the said first named patent for the rancho Gaudaloupe, of date June 30, 1866, was again transmited by the Commissioner to the Surveyor General for delivery, but the then sole owner, said Le Roy, refused to take the same, claiming the said patent of date March 1, 1870, to be the valid patent. Said patent, of 1866, was, however, retained by the Surveyor General until April 1, 1877, when that officer, without the knowledge or consent of Le Roy, delivered the same to an agent of certain persons to whom said Le Roy had conveyed certain premises, which were included in both of said patents, of date June 30, 1866, and March 1, 1870. The premises so conveyed are not embraced in plaintiffs' demand, nor has there ever been any

delivery or acceptance of said patent of 1866, except as above stated.

After the delivery to said Le Roy of the exemplified copy of the patent of date March 1, 1870, he brought suit of ejectment in the Circuit Court of the United States against Tobias B. Jamison et. al. for the same premises described in the complaint in this action, and said defendants answered. The plaintiff in error in the case at bar, claiming an undivided interest in the rancho Punta de la Laguna, together with others, their tenants in common, united with the defendants in said action in their defence thereof, and employed and paid counsel therein, but without becoming parties to the record by name. In this action Le Roy had judgment against the defendants and in execution thereof was put in possession. Such judgment is still in full force and unreversed.

In the case at bar, No. 266, issue was joined and a jury having been waived by stipulation, the cause came on to be tried by the court without a jury and after hearing the testimony and argument of counsel, the court found the facts as stated in substance above, and as conclusions of law, the following:

1. "That the plaintiffs were not seized of the premises in question nor any part thereof at the time of the commencement of this action, or at any time afterwards; and that they were not then, and they are not now entitled to the possession thereof."

2. "That the defendant Le Roy, at the date of the commencement of this action was seized in fee of the premises in question, and he has ever since continued to be seized in fee thereof, and that he and the other defendants named, as his tenants, at the date of the commencement of this action, were, and they ever since have continued to be, in the rightful and lawful possession of said premises and every part thereof.

3. "That defendants are entitled to judgment."

Judgment was entered accordingly and the cause was subsequently brought into this court by writ of error.

BRIEF OF COUNSEL.

Upon the question common to these two cases, viz: The power of the Land Department of the Government to recall and cancel a patent which has been made out in due and usual form in the General Land Office, signed by the President, by his private secretary thereto by law authorized; countersigned by the recorder of the General Land Office; the seal of the said office affixed and the said patent so prepared duly recorded in said office in its records of patents,—we desire to submit the following suggestions for the consideration of the court.

I

THE GOVERNMENT GRANTS AND THE PATENTEE TAKES BY MATTER OF RECORD.

The prerogative of the King of Englan dto grant franchises or dispose of the public domain is exercised through the medium of various officers, thereto appointed by law, each of whom, and in regular succession, makes formal record of the thing done, which record, completed, evidences to all time and for all purposes, the grant made. A warrant from the crown, put into the form of a bill by the attorney and Solicitor General is sealed with the privy signet of the principal Secretary of State. It is then approved and signed by the King—passing to the keeper of the privy seal, that officer makes out a writ thereupon to chancery, which, if no objection is therein made, is a warrant to affix the great seal to the patent. This affixing of the great seal completes and perfects the grant, which is thereupon enrolled in the Petty Bag or Enrollment office.

In the United States an equally well defined method for disposing of the public domain is provided by law. Any

person entitled to a patent or entitled to initiate a claim which may result in a patent, presents the evidence of his right to the subordinate officers of the land department, according to the nature and character of his claim. These officers act upon the same and transmit it to the Commissioner of the General Land Office. That officer, if the claimant appears to him to be entitled, thereupon issues to him letters patent in the following manner: A patent is prepared and presented to the President of the United States, who, by a private secretary, thereto lawfully authorized, signs the same; it then receives the countersignature of the recorder of the General Land Office and the seal of the General Land Office is affixed; thereupon it is recorded in a book known as the records of patents, a part of the files of the General Land Office.

Under both systems, the government grants and the patentee takes by matter of record.

Bacon Abr. Title Pre. "F."
2 Black. Comm. p. 344.
3 Wash. R. P. p. 520.
1 Cov. & Hughes p. 738.
Willis vs. Jermin, Cro. Eliz. 167
Ex Parte Beck, 1 Bro. C. C. 578.
Ex Parte Koop, 6 Ves. 599.
Leigton's Case, 2 Vern. 173.
Slingsley's Case, 3 Swan. 178, note.
O'Reiley's Case, 1 Ves. Jr. 112.
People vs. Livingston, 8 Barb. 255.
Smalley vs. McIlvain, 14 Ga. 254.

"It is a rule of the common law that the King can only give by matter of record. Therefore the King's grants are contained in charters or letters patent, under the great seal, enrolled."

5 Cruise, R. P., mar. p. 40.

"No livery of seizen is neccessary to perfect a title by letters patent. The grantee in such a case takes by matter

of record and the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vincinage"

Green vs. Liter, 8 Ch. S. C. 247.

II

THE RECORD COMPLETE WHEN PATENT IS SIGNED, SEALED AND RECORDED.

As counsel will attempt to show hereafter, the simple signing and sealing of a patent is sufficient to pass the title. The recording of a patent is, however, the last act performed in completing the record. Whether essential to the complete investiture of title or not, it is the practice of the land department to make a record of the executed patent. It is the last recorded act ever done by the executive in connection with the grant. When completed there is nothing further that remains to be done by intendment of law or in practice. The patent, as the deed of the Government, is fully executed and the Commissioner has put a full copy of it upon the records of his office. Nothing remains to be done except the ministerial act of delivering the patent to the grantee. That act, when performed, forms no part of the record made in passing the title and if the fact appears at all from the files of the General Land Office, it is only as an incident connected with the discharge of that ministerial duty.

"If the instrument be the deed of the Government, that is, its patent, it is in that condition (ready for acceptance by grantee) when the last formalities required by law of the officers of the Government are complied with. Those formalities consist in passing the instrument under the seal of the United States and in recording it in the records of the General Land Office."

Justice Field in *LeRoy vs. Jamison*. 2 Saw. 493.

III

ENTRIES OR MEMORANDA MADE ON THE RECORD AFTER RECORDING ARE NO PART OF THE PATENT.

After the completion of the record the Commissioner has no power or authority to set it aside or to alter, change or modify it in any way. As an officer invested with a special and limited power, he has exercised his jurisdiction and is *functus officio.* Any subsequent alteration of the record, without the consent of the grantee, is without authority of law and utterly void and of no effect.

The case of *Foster vs. Dugan* (8 Ohio, 87) was an action of ejectment. The rights of the parties depended upon certain proceedings in partition through a sheriffs' deed. On the margin of the record of the deed the recorder entered the following memorandum: "This deed was drawn by the recorder and executed in his presence by the sheriff. It was left in the office, subject to some arrangement with the grantee, but not delivered to him. Afterwards, by an error, entered on record by the recorder. J. W. Brown."

This was an attempt by the county recorder to correct an error made by him in the ordinary discharge of his duties, by *altering a record which he had made.* With reference to his power to do this the Court said: (p. 107.)

"The marginal note made by the recorder, on the registry, cannot be admitted as evidence to affect the validity of the deed. When it was made, does not appear, but it must have been after registration. It is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties, he is *functus officio* and has lost his power over the subject."

The case of *Merrick vs. Wallace* (19 Ill. 486) was an action of ejectment. A deed was introduced in evidence, the record of which was proven to have been changed in the description, but the court held that: "An alteration

of a public record cannot deprive an innocent party of the benefit of it, as originally made." After showing that the deed was properly recorded the court say:

"The question then arises, being properly recorded, can any subsequent alteration of the record deprive an innocent party of the benefit of the record? Shall not the record be read as evidence, according to the fact, as certified by the recorder and not as it now appears? Is the grantee in any manner responsible for the alteration and must he account for it? Can any rule of law or principle of justice be successfully invoked to make him responsible? We know of none." * * * * "His whole duty being discharged by actually having his deed properly recorded, no subsequent act committed on that record can affect him under such circumstances as are developed here."

The case of *Farmers & Mechanics Bank vs. Bronson*, (14 Mich. 361) was an equitable action to redeem certain premises from the effect of a mortgage, and charge defendants with certain rents and profits. The defentants relied on a paramount title, and to sustain this title set up a claim of an equitable mortgage which they claimed took precedence of the plaintiff's mortgage for the reason that the mortgage under which the redemption was sought was only an equitable mortgage, the mortgagors having failed to attach seals to their signatures. The original of the last named mortgage was not put in evidence, and the evidence that the seals were wanting consisted in the fact that no seals appeared opposite the names in the copy given from the record, and that the register of deeds certified that the words "not sealed" were entered in the record opposite the names in the handwriting of his predecessor. The court said:

"This certificate is not legal evidence. The register was bound to record all instruments, properly executed, by spreading a true copy on the record but he had no authority of

law for certifying statements of fact to make them evidence against other parties. The original entry being unauthorized would not be evidence, and the copy would be equally incompetent."

In *Bigelow vs. Stilphens* (35 Vt. 527) the court say:

"We think the rule, as indicated by reason and authority, is that an alteration of a written instrument by a stranger, without authority, does not render such instrument void."

In *Fawcett vs. Kinney* (33 Ala. 264) the court say:

"The mere cancellation of the deed does not divest the title of the grantee."

In *Henfru vs. Bromley* (6 East. 310) it was held "that if an umpire alter an award in a material part, after the expiration of his power, the award is not thereby rendered void but is good as originally made."

In *Jackson vs. Malin* (15 Johns. 293) Platt, J. says:

"That a material alteration * * * by a stranger without the privity of the party claiming under it, renders the deed void, is a proposition to which I am not ready to assent."

In *Nichols vs. Johnson* (5 Comst. 192) the court say:

"It can hardly be conceived, if a deed or other instrument of writing is not rendered inoperative, either by a mistaken alteration or its loss, or even entire destruction, how it can be by an unauthorized intermedling of a stranger."

In *Rees vs. Overbaugh* (6 Cowen 746) it was decided that if a stranger tear a seal from a deed it shall not destroy it.

The case of *Owens vs. Norwood* (2 H. & J. 96) was an action of ejectment. The plaintiff read in evidence an office copy of a deed from Thomas Brown, the patentee to John Gadsby, bearing date the 2d day of May, 1700, for the land called Brown's Adventure, purporting to be sealed and delivered by Brown, in the presence of Charles Carroll and Thomas Bland and having the following endorse-

ments: "May 4th, 1699. Then received of the within named John Gadsby, the sum of two pounds sterling, being for the fine due the Right Honorable, the Lord Proprietory, upon the alienation of the land within mentioned. As witness my hand; Cha. Carroll."

The clerk endorsed on the record of this deed the following memorandum: "That the date of this was originally according to the date of the above receipt, but altered by consent of the Provincial Court and parties to bring it within the act of Assembly." The court held "the endorsement not evidence, being an act done by Tayland without authority and that the deed is operative and valid to transfer the land to Gadsby."

The same doctrine as to the finality of a record once made by a public officer is maintained in the following cases:

Lick vs. Diaz, 30 Cal. 72
Leblanc vs. Ladrique, 14 La. Ann. 772.
Medlen vs. Platt Co. 8 Mo. 235.

And when an officer vested with special and limited jurisdictipn, once exercises the same, he is thereafter without further power and *functus officio.*

Cripps vs. Durden, Cowp. 646.
Ex Parte Randolph, 2 Brock. 447.
Bours vs. Zachariah, 11 Cal. 281.

In the case at bar, the land department, after the record had been completed in manner and form as hereinbefore stated, that is to say after signing, sealing, and recording of the patent, undertook to effect the cancellation of the relator's grant by writing across the face of said patent and across the face of the record thereof the words: "Cancelled by letter G. dated October 10, 1879." The same power was claimed by the said department and attempted to be exercised in the case of the Guadaloupe patent of 1870.

It is submitted that such an assumption of power was entirely without the authority of law; that for the purpose of issuing these patents the Commissioner was an officer of limited and special jurisdiction; that when such jurisdiction was exercised by the issuance of these patents, all power in the Commissioner over the subject matter ceased and that he was, thenceforth *functus officio*. It is further submitted that the attempted cancellation of the patent by such an entry or memorandum was *ultra vires* and utterly void. The endorsement legally forms no part of the patent and has no effect whatever upon the rights of the patentee, who is entitled to the record precisely as it stood before the attempted alteration.

IV

THE LAW WILL NOT PERMIT AN OFFICER TO IMPEACH HIS OWN RECORD.

The attempted cancellation of these patents by the Commissioner was an impeachment of a public record by the very officer who made it. This the law will not permit to be done. *Quod per recordum probatum, non debet esse negatum.*

In 6 *Opin. p.* 226, Attorney General Cushing says:

"The Secretary of the Interior, acting conscientiously, as the the complainant concedes, has decided a question of fact, which he alone had power to decide; according to his judgment of the truth, has in conformity with such judgment, awarded the contract to one of such bidders, who now has a vested right therein. The act of Congress provides no method, by which that decision may be revised; it is final so far as regards the subject matter, that is, the particular contract, as in the case of any other matter decided in good faith, whether erroneously or otherwise, by the official authority to whom the decision belongs."

In *Holmes vs. Budd* (11 Iowa, 190) it was held that th

certificate of the clerk of the district court will not be received to impeach a record entry. The court say:

"The record is better evidence than the subsequent certificate, and must prevail."

"The judgment as appears from the record was entered upon the 13th day of December, 1859. There is a record entry made by the clerk of said court on the 11th day of January, 1860, in which it is stated that there was filed in his office of that date, an order of the judge of said court directing him to enter up a judgment in this cause upon the verdict of the jury. We cannot regard this as sufficient to show that the record of the judgment was not made at the time it purports to have been made. Nor do we regard the certificate of the clerk made in this cause after this transcript was sent to this court as sufficient to impeach his record entry. In this transcript he certifies that this judgment appears of record as made upon the 15th day of December, 1859, and this is certified to as being a full and complete copy of the record of said cause. The record is better evidence than the subsequent certificate and must prevail."

In the case of *Babb vs. Carroll* (21 Tenn. 765) it is decided that in granting the certificate of a headright, it is the duty of the Commissioner to inquire if the party applying had a family in Texas, and having determined the fact, it is not open to subsequent investigation after the issue of patent *or even before.*

When a justice of the peace certifies at the bottom of a paper purporting to be the record of a judgment before him that it is a true copy, it is sufficiently authenticated to be read in evidence. But testimony from the justice that he had in fact made no record, is inadmissable.

"It would be totally irregular to receive the parol testimony of the magistrate that there was no record of such

judgment which he had in his official capacity, certified to exist."

Wheeler vs. Lathrop, 4 Shep. 20.

An entra of an order in the minutes of proceedings in the County Court, or a copy of it, cannot be contradicted by the evidence of the judge.

Derves vs. Rigby 7 E. C. L. & E. 469.

When the record certified by the clerk of the circuit court, states that an appeal was taken in open court, no evidence *dehors* the record can be received to impeach its verity on a motion to dismiss the appeal for want of jurisdiction, etc.

Hudgins vs. Kemp, 17 How. 530.

Certificates and statements of the clerk outside of the record and given since it was certified and transmitted to the court, cannot be received for the purpose (Id. p. 534)

A notary, after taking and certifying an acknowledgement, cannot impeach his own certificate by afterwards altering or amending it

Bours vs. Zachariah, 11 Cal. 281.

An alcalde of a pueblo cannot change the record of a grant which he has once made.

Lick vs. Diaz, 30 Cal. 65.

V

NO OFFICER CAN CORRECT, AMEND OR REVERSE THE ACTS OF HIS PREDECESSOR.

This rule arises from the very necessity of the situation. The executive officers charged by law with jurisdiction to determine questions of this character, hold their offices by precarious tenures. One succeeds the other in almost total disregard of all considerations except those of political expediency or party supremacy. They cannot be expected to view alike all questions of law or fact. The incumbent of to-day may entertain an entirely different view from

his predecessor of yesterday and his successor of to-morrow may disagree with him. If each of these officers, merely because he is charged with the duty of deciding questions of a particular character, has power to set aside the final judgment or decision of his predecessor, then the adjudication by them of property rights is a settlement only in name and the records of the department, which should be for all time, monuments perpetuating the solemn acts of the executive, are simply the playthings of succeeding administrations.

And so both reason and the authorities declare that a final disposition of any case by such an officer puts the subject matter beyond the jurisdiction of any who may succeed him.

In 2 *Opin.* 9, Attorney General Wirt declares that it is a rule which each administration has prescribed for itself, to consider the act of its predecessor conclusive; if open for review or reversal the same principle will open decisions made during the presidency of Washington and keep the acts of the executive perpetually unsettled.

In 5 *Opin.* 29, Attorney General Toucy holds that there is no law which authorizes the head of any department to review the act of his predecessor.

To the same effect is the doctrine of each of the following cases:

Att'y. Gen'l. Johnson, 5 Opin, 123.
" " Crittenden, Id., 285.
" " Black, 9 Id., 32 and 101.
" " Stanberry, 12 Id., 355.
" " Hoar, 13 Id., 33.
" " Ackerman, Id., 387.
" " Bristow, Id. 457.
Riley vs. U S., 1 Ct. Claims, 299.
Chorpenning vs. U. S., 3 Id., 147.
Mitchell vs. Cobb, 13 Ala., 137.

Franklin vs. Woodland, 14 La., Ann., 188.
Wilcox vs. Jackson, 13 Pet., 511
U. S. vs. Bank of Metropolis, 15 ld. 401.
Kendall vs. Stokes, 3 How. 98, 99.
Bours vs. Zachariah, 11 Cal. 281.

VI

IF ANY DELIVERY OF A PATENT IS NECESSARY THE TRANSMISSION OF THE SAME TO THE REGISTER OR SURVEYOR GENERAL FOR DELIVERY TO PATENTEE IS, IN LAW, A DELIVERY.

Delivery of a deed may be made by act without words or by words without acts; it may be made directly to the grantee or to his agent; or it may be given to a stranger for the use and benefit of the grantee In either case the instrument is legally delivered, within the narrowest definition of the terms laid down in the authorities.

The case of *Doe vs. Knight* (4 Barn & Cress, 671) is an early case upon this point. The main question involved was whether there was a sufficient delivery of a mortgage deed under which the lessor of the plaintiff claimed. The facts were substantially as follows: Wynne, an attorney, seized in fee, had misappropriated funds of a client, one Garnons, and was thus indebted to him. He communicated the fact to Garnons, and assured him that he would make him secure. Wynne then went to his (W.'s) sister's residence and produced the mortgage, sealed. He signed it in the presence of his niece, saying: "I deliver this as my act and deed." The niece, at his request, signed her name, as a witness. Wynne then took the deed away. The niece knew nothing of the contents of the deed, nor had she any authority whatever from Garnons to receive it. Subsequently Wynne took a package to his sister, saying: "Here, Bess, keep this, it belongs to Mr. Garnons." In a

few days he came again to his sister and got the package, kept it a few days and returned it, saying:" Here, put this by." This package contained the deed. Wynne died, the package was opened and the deed found.

Upon the question of delivery, thus presented, Bayley, J., delivering the opinion of the court, said: (p. 689.)

"Upon the first question, whether a deed will operate as a deed, though it is never parted with by the party who executed it, there are many authorities to show that it will." He then cites, Barlow vs. Henze, Prec. Ch., 211; Clavering vs. Clavering, 2 Vern., 473; Noldred vs. Gilham, 1 Pr. Wins., 517; Broughton vs. Broughton, 1 Atk., 625. "Upon these authorities it seems to me that when an instrument is formally *sealed and delivered and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party; nothing to show that he did not intend it to operate immediately; that it is a valid and effectual deed and that delivery to the party who is to take by it, or to any person for his use, is not essential.* * * * * But if this point were doubtful, can there be any question but that delivery to a third person for the use of the party in whose favor a deed is made, when the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit (East, 628) * * * * Shepherd, who is particularly strict in requiring that the deed should pass from the possession of the grantor * * * lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger for his use and on his behalf, (Shep. Touch. 57); and 2 Roll. Abr. (K) 24, pl. 7; Taw vs. Bury (1 Ander, 4) and Alfred vs. Lea (Cro. Eliz. 54) are clear authorities that on delivery to a stranger, for the use and on behalf of the grantee, the deed will operate instanter and its operation will not be postponed till it is de-

livered over to or accepted by the grantee." The court then quotes the language of Lord Coke in Butler vs. Baker (3 Co., 26, b.): "If A makes it an obligation to B, and deliver it to C, to the use of B, this is the deed of A presently;" and then concludes: "Upon these authorities we are of the opinion *that the delivery of the deed by Wynne, and putting it into the possession of his sister, made it a good and valid deed, at least from the time it was put into the sister's possession.*"

In the case of *Church vs. Gilman* (15 Wend., 656) the question of delivery arose upon the following facts: The defendant, having paid to the State of Connecticut a valuable consideration for certain premises of which she was seized in fee, employed one Ward to procure a conveyance thereof. The State Treasurer, was, by statute, the proper officer to make such a conveyance. Ward prepared the deed and sent it to the Treasuer to be executed and returned. The Treasurer signed, sealed and acknowledged it and *delivered it to one Burr to be sent to Ward for the defendant.*

The court said: "The delivery of the deed of the State of Connecticut to Mr. Burr, as the deed of the State for the use of the grantee, the defendant, was a good and valid delivery." (p. 604.)

In the case of Tate vs. Tate, (1 Dev. & Batt., 26), the court said:

"When the maker of a deed parts with the possession of it to any body, there is a presumption that it was delivered as a deed for the benefit of the grantee * * * * such a delivery to a third person is good and the deed presently operates."

In the case of *Steele vs. Lowry*, (4 Ohio 74-5) a deed of trust to trustees for the use of children by a future marriage, was, with the consent of the future husband, made by

the grantor and duly executed. The grantor directed that it be recorded and delivered. The grantee accepted the trust but never in fact received the deed. The court held that this was a sufficient delivery of the deed and that title instantly passed.

In *Tibballs vs. Jacobs*, (31 Conn., 431) the court held that where a deed is delivered to a third person for the grantee, neither his presence nor his previous authority nor subsequent express consent is necessary to make the delivery valid. If beneficial to him, his assent will be presumed in absence of proof to the contrary.

In the case of *Warren vs. Swett* (11 Foster N. H., 340) the the court said:

"No form of words is necessary in the delivering of a deed; it is complete when the grantor has parted with his dominion over it, with intent that it shall pass to the grantee, provided the grantee assents to it either by himself or agent."

A delivery may be by words without acts or by acts without words and it may be to the grantee or to a third person without any special authority, for the use of the grantee.

Verplank vs. Sterry, 12 John., 536.
Jackson vs. Phelps, Id., 418.
Jackson vs. Bodle, 20 Id., 187.
Souverbye vs. Arden, 1 Johns. Ch., 254-5.
Jones vs. Jones 6 Conn., 111.
Scrugham vs. Wood, 16 Wend., 546.
Porter vs. Cole, 4 Green'f., 21.
Blight vs. Schenck, 12 Barb., 285.
Bullett vs. Taylor, 34 Miss., 741.
Hatch vs. Hatch, 9 Mass., 307.

In the case of *Stevens vs. Hatch* (6 Minn. 19) it was held

that to constitute a valid delivery it is not necessary that the deed should pass out of the grantor's hand or beyond his control, if he, either by act or words, expresses his will that it is for the use of the grantee and the latter assents. The court said :

"The doctrine seems settled beyond a reasonable doubt that when a party executes and acknowledges a deed and afterwards either by act or words, especially expresses his will that the same is for the use of the grantee, especially when the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, although the deed remains in the hands of the grantor. * * * The main thing the law looks at is whether the grantor indicates his will that the instrument shall pass into the possession of the grantee and if that will is manifest, then the conveyance inures as a valid grant although, as above stated, the deed never comes into the hands of the grantee," (pp. 74, 75, 76.)

Viewed in the light of these authorities, it is manifest that the patents in the two cases now before the court were legally and technically delivered ; first, by their actual delivery to a third person or stranger for the use of the patentees ; second, by such notorious acts and declarations by the grantor as of themselves amount to legal delivery.

First. The patents after sealing and recording, were transmitted by the Commissioner, the one to the Register and the other to the Surveyor General, with express directions that they be delivered to the patentees. This was delivery to a third person or stranger for the use of the patentee.

There is no provision of law which confers any jurisdiction whatever upon either of these officers, in connection with the issuing or delivery of a patent. They are not legally in respect of this power a part of the patent-making branch of the executive, or the agents of the government in

any sense. They are officers created by statute and vested by law with certain well defined and limited powers. The delivery of a patent for public land, is not one of them. Nor can they be invested with any such jurisdiction by the regulation or practice of the Commissioner or Secretary. Each of the last mentioned officers is himself, a creature of the statute with expressly limited and well defined powers, beyond which he cannot legally act. Neither is authorized to confer on the Register or Surveyor General additional jurisdiction or power. Any attempt to thus enlarge the jurisdiction of the local land officers beyond the limit prescribed by statute, would be manifestly an excess of power and a void act.

The jurisdiction and power of the Register and Receiver are expressly defined in the Revised Statutes, Secs. 2234 to 2247 inclusive, and in the various statutes for the disposal of the public domain. These provisions of law make the Register a *quasi judicial* officer, for the discharge of certain well defined and limited duties. As such officer he has a jurisdiction entirely independent of the Commissioner and is not subject to his direction save in some exceptional cases expressly provided for by statute. He is appointed by the President, and confirmed by the Senate, his duties are expressly defined by the various statutes and from his decision appeal lies to the Commissioner.

The Surveyor General is an officer of like character. His powers are limited and defined by the Revised Statutes, Secs. 2207 to 2233, and various statutes relating to the survey of the public domain and the segregation of private grants. He is, like the Register, while acting within his jurisdiction so specially conferred, entirely independent of the Commissioner. The Commissioner, the Surveyor General and the Register are separate, distinct and independent tribunals, each acting in a limited jurisdiction specially conferred by statute.

Without attempting a full recitation of the statutes, con-

ferring these special powers, counsel content themselves with calling the attention of the court to the fact that in none of them is any power or jurisdiction conferred, either directly or by implication, upon the Register or the Surveyor General in respect to the issuing or delivery of a patent. On the contrary the issuing of the patent is the expressly prescribed duty of other officers of the government.

Section 450 of the Revised Statutes provides: "The President is authorized to appoint, from time to time, by and with the advice and consent of the Senate, a secretary, at a salary of one thousand five hundred dollars a year, whose duty it shall be, under the direction of the President, to sign in his name, and for him, all patents for land sold or granted under the authority of the United States."

Section 453, provides: "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also such as relate to private claims of land, and the issuing of patents for all (*Agents*) (grants) of land under the authority of the government."

Section 458, provides: "All patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President, and countersigned by the Recorder of the General Land Office; and shall be recorded in the office, in books to be kept for the purpose."

Section 459 provides: "It shall be the duty of the Recorder of the General Land Office, in pursuance of instructions from the Commissioner, to certify and affix the seal of the office to all patents for public lands, and to attend to the correct engrossing, recording and transmission of such patents. He shall prepare alphabetical indexes of the names of patentees, and of persons entitled to patents."

By these provisions of law the President, the Commissioner, and, under his direction, the Recorder of the General Land Office, are charged with the duty of issuing the patent. The only provision relating to the manual transfer of the paper from the government to the individual is contained in Sec. 459, which enacts that the Recorder shall attend to the "engrossing, recording and *transmission*" of the patent.

It follows from these considerations that when the Commissioner transmitted the patent to the Surveyor General and it came into that officer's possession, he held it, not as a part of the executive branch of the Government, nor, indeed, as the properly constituted agent of the executive, but as a third party or stranger, and for the use and benefit of the grantee. No law made him the executive custodian of the patent, and no law empowered the Commissioner to make him an agent for the purpose of delivery. He stands in the position of a stranger holding as trustee for the beneficiary. And that constitutes delivery

Second. The acts and declarations of the Commissioner accompanying the fact of the issuing and transmission of the patent constitute a legal delivery.

The opinion of the court in the case of *Stephens vs. Hatch* above quoted, is a fair and accurate statement of the law as it stands to-day upon this question, after repeated adjudication by the courts of both England and this country. It is to the effect that when the grantor, after executing and acknowledging a deed, "*express his will that the same is for the use of the grantee, especially if the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, althongh the deed remains in the hands of the grantor.*"

Can there be any doubt as to the *will* of the Commissioner, what he intended to accomplish, when he transmitted the patent to the Surveyor General? Certainly not. He intended to pass it, as the deed of the United States,

to the Surveyor General, for the use of the patentee; precisely the same state of fact as developed in the case of *Church vs. Gilman* 15 Wend., already cited.

The idea of recalling it, was, confessedly, an after thought; a determination formed and executed after he had unequivocally expressed his will that it should operate as a conveyance, and, in execution of that will, had sent it to the Surveyor General and expressly directed him in writing to deliver it to the grantee.

The deed was executed in due form, the will of the grantor was unequivocally expressed and the assent of the grantee appears. This was a delivery and passed the title.

VII

THE PATENT TAKES EFFECT WITHOUT DELIVERY.

We have already attempted to show that the patentee takes by matter of record. The various steps from the initiation of his claim down to the recording of his patent by the Recorder of the General Land Office, constitute a formal record of a grant made by the Government to the patentee. The grantee proves his title by this record.

We now assert, with the utmost confidence in the soundness of the proposition, that no delivery of the patent is neccessary to pass the title. The patent operates as the deed of the Government, without delivery, the moment the seal of the Land Office is affixed thereto; certainly the moment it is recorded in the records of patents.

It will be conceded that if delivery is necessary it must be so by virtue of some provision of law. A mere executive regulation or the practice in an executive office will not make delivery an essential element in the transferring title. Unless the law prescribes it, no delivery is necessary. In other words, title passes when all has been done which the law prescribes shall be done.

The executive officers of the Government are vested with authority and power to issue a patent only so far as jurisdiction is expressly conferred by statute. They have no inherent power in such cases. The President can only act in the manner prescribed by the legislative branch of the government, Congress having "the sole power to determine by whom, to whom, and upon what conditions" patents shall issue and "to declare their dignity and effect."

Stockton vs. Williams, (1 Doug. Mich. 562.)

Now, Congress has never provided in any statute that delivery should constitute a part of the transaction. On the other hand, the statutory law on the subject, quoted above, expressly provides for the issuing of a patent, by matter of record. The only place in the entire revised statutes where the manual transfer of the paper is mentioned is in section 459, where the word "*delivery*" is carefully avoided and the word "*transmission*" used.

So too the adjudicated cases, in an almost unbroken line, declare that no delivery is necessary in the case of a grant by the government.

Governmental grants by act of the legislature have been frequently considered by the courts, in respect of the elements necessary to make them perfect. The delivery of possession, the livery of seizen, was a necessary and indispensible part of every feudal transfer. Anciently it was given without a deed and when, in later times, a deed accompanied it, it was simply as an authentication of the transaction. The delivery of possession, livery of seizen, was the essential element. Yet this ancient requirement, so indispensible between individuals, was never applied to grants by the sovereign.

Seizen in law is sufficiently established by the intent and

words of an act of Parliament and actual delivery of possession is not necessary.

Bevil's case, 2 Co., 276.
Hill vs. Dyer, 3 Greenl'f., 441.

In *Enfield vs. Permit*, (8 N. H. 512) the court said:

"A grant of land by an act of the legislature vests an actual seizen in the grantee. The grant in such a case is a public act, much better calculated to give notoriety to the conveyance than actual entry on the land by an agent of the state or by the grantee. And this notoriety of the grant is, in contemplation of law, equivalent to actual entry by the grantee."

The grant of the State, as the same appears of record, is equivalent to livery of seizen in the case of individuals at common law.

3 Washburn, R. P., mar. p., 520.
Bellows vs. Copp, 20 N. H., 492.
McCoughal vs. Ryon, 27 Barb.,376.
Robinson vs. Lake, 14 Iowa, 424.
Dow vs. Craft,, 1 Kerr, N. B., 546.
Enfield vs. Day, 11 N. H., 520.

So too the essential elements in the issuing of a patent have been frequeutly defined by the courts.

A patent derives its authority and becomes the deed of the government by virtue of its being sealed. When sealed it is the deed and passes title

Washburn in his work on real property (Vol. 3, mar. p., 520,) says; "A patent, when regularly and properly issued, becomes a complete evidence of title. In like manner patents under the States derive their authority from the great seal of the State being annexed to the same."

And in *McGarrahan vs. United States*, (6 U. S., 316,) the court said:

"Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land Office and countersigned by the Recorder. *Until all these things have been done*, the United States have not executed a patent for a grant of land. Each and every one of the integral parts of the execution is essential to the perfection of the patent. * * * * * To be valid a patent must be actually executed. Before it can operate as a grant, the last formalities of the law, prescribed for its execution, must be complied with.

The case of *Phillips vs. Erwin*, (1 Over., 235,) was an action of ejectment. The defendant produced a grant from the State which had not been countersigned by the Secretary of State. It was objected to on that ground. The court said; "This is a good grant, notwithstanding the Secretary has omitted to countersign it. The grant is authentic and passes the interest of the State, when the Governor puts his signature and affixes the seal of the State."

And to the same effect are the following cases:

People vs. Livingston, 8 Barb., 255.
Smalley vs. McIlvain, 14 Ga., 254.
Hulick vs. Scoville, 4 Gilm., 174.
U. S. vs. Johns, 4 Dall., 416.

On the point now directly under consideration, viz., the delivery of the patent, we are enabled to invite the attention of the court to many positive and plain authorities.

"The King's letters patent under the great seal of England, *need no delivery*, nor his grant under the great seal of the Duchy of Lancaster, *for they are sufficiently authenticated and completed by the annexing of the respective seals to them.*"

Cruise on R. P., Vol. 5 mar, p., 40.

In the case of *Willis vs. Jermin*, (Cro. Eliz. p. 167) the following question was presented: "The Dean and, Chapter of Exeter let land to one H. by lease conditioned to terminate upon default in payment of the rent reserved. Afterwards, and upon default, the Dean and Chapter made another lease, to plaintiff, in their chapter house, put their seal to it and made letters of authority to J. S. to enter and make delivery. The following objection was raised: "The lease was not good because the Dean and Chapter let it in the Chapter House, by setting their seal to it, which being a perfecting of the deed of the corporation, there can be no other delivery; that the first lessee continuing in possession and they out of possession, the lease was void, and the delivery after by an attorney, it having a former delivery, was void." But the court held the lease to be valid, and declared "there is no other means for a corporation to make a lease but this."

A patent once passed the great seal is a legal grant without further proceedings.

Ex Parte Koop, 6 Ves., 598.
Ex Parte Beck, Bro., C. C., 578.

As early as 1841, this question arose in the administration of the General Land Office, under the following circumstances: Pierre Mutelle, for services in the army, became entitled, under the act of May 6, 1812, to one hundred and sixty acres of land. July 14, 1815, he filed an order of location and asked that the patent be delivered to one John L. Bogardus. After engrossment but before delivery of the patent, Mutelle filed papers alleging fraud on the part of Bogardus and instructed the office to withhold delivery from him. The patent was made out but not delivered and in 1841 still remained in the General Land Office. On August 14, of that year, one Thomas J. Northrup, filed with the Commissioner an affidavit that he

(N.) was the owner of the land and asked for the patent. This request was refused by the Commissioner who held that no title had ever passed to Mutelle. August 30 of the same year, Secretary Toucy, upon a case stated by the Commissioner, asked the opinion of the Attorney General.

In response Attorney General Crittenden, (3 Opin. 654) said: "My opinion is that the title to the land *did pass to Pierre Mutelle at the date of the patent to him, though that patent still remains in the land office without any actual tradition of it to any one.* The patent was issued by authority and direction of law and upon general principles *where the patentee does not expressly dissent,* his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions because in this and in all such cases the acts required to be done by the claimant and actually done by him in the preparation of his claim for patenting are equivalent to a positive demand of the patent and amount to an acceptance of it. The patent in the meaning of the act referred to *is granted to the patentee from its date, though he may never actually see or receive it,* and is valid and effectual to pass the title of the land."

"All legal muniments of title belong to him who owns the land, * * * * * * but as the patent is a recorded evidence of title always accessible, no material prejudice can result to the true owner from a stranger getting possession of it.

In the celebrated case of *Marbury vs. Madison,* (1 Cranch, 150) Mr. Lee, of counsel in the cause, propounded to the Supreme Court the following pertinent questions:

"Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the President who gives a warrant to affix the great seal to the patent; he refuses to do it. Shall I not have a *mandamus* to compel him? Suppose the seal is affixed but the Secre-

tary refuses to record it; shall he not be compelled? Suppose it recorded and he refuses to deliver it; shall I have no remedy?"

To this the court replied: "By the act passed in 1796, authorizing the sale of the lands above the mouth of the Kentucky River, (Vol. 3, p. 299,) the purchaser on paying his purchase money becomes completely entitled to the property purchased, and on producing to the Secretary of State the receipt of the Treasurer, upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State and recorded in his office. If the Secretary of State *should choose to withhold this patent*, or the patent being lost should refuse a copy of it, can it be imagined that the law furnishes to the injured party no remedy? *It is not believed that any person whatever would attempt to maintain such a proposition.*"

In deciding the main points in the case cited, the Supreme Court asserted doctrines equally applicable, as the whole tenor of the opinion shows, to patents as to commissions.

1st. That by signing of the commission of Marbury, the President of the United States appointed him a Justice of the Peace, and that the *seal* of the United States affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature and of the completion of the appointment and that the appointment conferred on him the *legal right* to the office.

2nd. That having this legal title to the *office* he had a consequent right to the *commission*, a refusal to deliver which is a plain violation of that right for which the laws of his country afford him a remedy.

"Where he is directed by law to do a certain act affecting the absolute rights of individuals in the performance of which he is not placed under the particular direction of the President and the performance of which the President

cannot lawfully forbid, and therefore is not presumed to have forbidden, as, for example, to record a commission *or a patent for land* which has received all the legal solemnities, or to give a copy of such record; in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual than if the same services were to be performed by a person not the head of a department."

In *Green vs. Liter*, (8 Ch. S. C., 247,) hereinbefore cited, this court held that no livery of seizen was necessary in case of letters patent, the grantee taking by matter of record which was of equal dignity and notoriety.

In *Levergne's Heirs vs. Elkin's Heirs* (17 La., 277) the plaintiffs claimed under an alleged grant from the former government of Louisiana. As proof of the same, they offered in evidence an exemplified copy of a paper purporting to be such a grant, which document, was a part of the records received from the former government. This was objected to for the reason that there was no proof *that the original had ever been delivered to the grantees.*

Justice Garland, delivering the opinion of the court, said:

"Was it ever in the possession of the grantees? The appellants contend that it was not and that delivery is the essence of a grant. If this proposition were true in all cases, it might be conclusive in this, but we do not so understand the law. The delivery of the thing granted is essential to the validify of the grant, but we do not consider it indispensably necessary that the evidence of title should be delivered to the party, also. In the case of Marbury vs. Madison, 1 Cranch, 138, which was elaborately argued and much considered, the Supreme Court of the United States held that a commission is only evidence of an appointment

and that a delivery is not necessaey to the validity of letters patent It is well known that the patents for lands issued by the general government are in most instances transmitted by the proper officer of the Treasury Department to the Registers in the different States, for the purpose of being delivered to the proper parties. Many of these *completed grants* are not delivered for years, and, in some instances, never. *Yet it was never doubted that the government was divested of all title and the patent irrevocable except for fraud.*"

The case *Ex Parte Kuhtman*, (3 Rich. Eq., 257,) involved a consideration and decision of the question whether delivery was necessary in a grant made by the State of South Carolina, by letters patent. In September, 1793, grants of certain lands owned by the State, were made out in the usual form, under her laws, but such grants *were not delivered to the grantees* but remained in the custody of the Secretary of State until 1817, when a special act of the legislature directed their delivery. In the case in 3d Richardson the question was directly raised whether *such grants took effect from their date in* 1793, *or their delivery in* 1817.

The court in deciding the point said: "This precise question was determined by the Constitutional Court in 1821, at Charleston, in the case of Hugh McBurney vs. Alfred Walter. It was there ruled that the grants *took effect from their date;* that under the law, the Governor, after the great seal was affixed, 'was empowered and directed to sign the same and thereupon deliver them to the Secretary of State, to be delivered to the respective grantees or their order. The grant then,' (concludes the court,) 'after having been signed and sealed was delivered to the Secretary to be delivered to the respective grantees and such delivery is as valid in law, as if made to the grantee himself.'

This decision was recognized and reaffirmed by the Court of Appeals at Charleston, in April, 1828, in the case of Simon Verdier vs. Hugh McBurney. Neither of these

issued under the provisions of the act of Congress of March 3, 1851."

The case of *Houghton vs. Hardenberg*, (53 Cal., 181-2,) was a suit against the United States Surveyor General for California, in which the plaintiff demanded judgment for the possession of a patent for land, executed in the usual form and transmitted by the Commissioner to the defendant for delivery to the patentee, but withheld by defendant under orders received from the Commissioner prior to any demand of the patent. The patent was for the rancho "Las Animas," which was a grant confirmed under the act of 1851. It was surveyed by the United States, and the patent was issued in due form and transmitted for delivery as above stated. The patent still remained in the custody of the defendant. A general demurrer filed by the defendant in the court below was sustained and plaintiff appealed.

The Supreme court reversed the jndgment of the court below, on the authority of *Chipley vs. Farris*, (45 Cal ante.) holding that no delivery was necessary and that an action would lie to compel a delivery against an officer having custody of the paper.

In *Cruz vs. Martinez*, (53 Cal., 239,) involving the validity of an undelivered patent for the pueblo lands of Los Angelos, the court reaffirmed the doctrine of the cases above cited and declared that the patent vested title without delivery.

Delivery, therefore, was not necessary to the investiture of title. The whole duty of the executive officers was fulfilled and their powers exhausted when the patent was signed, sealed and recorded. It then became a record, a fixed fact, beyond control, except in judicial proceedings. The instrument took effect from the affixing of the seal or he last act provided to be done by the government officers

and the validity or effect of the patent did not depend upon delivery.

VIII

THE LAND DEPARTMENT CANNOT RECALL OR CANCEL A PATENT.

Neither the Secretary of the Interior nor the Commissioner of the General Land Office had authority to cancel these patents, and their attempts to do so were null and void. To hold otherwise would be to give the inferior officer the power to annul and overrule the action of his superior.

It was an executive act to sign the patent; such an act could only be performed by the President, (*U. S. Constitution, Article II.*)

When so performed it was his judgment and determination that the claimant was entitled to the patent and that all pre-requisites had been complied with, under said act of March 3, 1851, and the subsequent acts relating to the same subject; and when the officers represented to *him* that it was proper he should sign the patent, they in effect said, we have examined the question and we find everything necessary to entitle the claimants to the patent to have been done.

This determination could not be overruled except by the courts even though the determination was arrived at by *fraud*, because upon the question of fraud or no fraud or irregularity (in obtaining the patent) the patentee is entitled to be heard or in other words the patentee is entitled to his day in court.

Hughes vs. U. S., 4 Wallace, 232-11 How. 532.
Field vs. Seabury, 19 How., 324-332.

So that when the land department made out the patent and recommended the President to sign it and it was signed, sealed and recorded the subordinate could not annul the action of the President.

O'Brien vs. Perry, 1 Black, 32.

The principle of law which forbids the recall and concellation of the patent is one which necessarily follows the other principles already mentioned. The patent once duly executed and the title passed, the government occupies the same position as a private invidual after execution and delivery of a deed. The individual has no power to recall his act; neither has the government.

"A party cannot pronounce his own deed void, although that party be a sovereign State."

Fletcher vs. Peck, 6 Ch. 87.

"The Kings letters patent cannot be made void by a naked order."

Mounson vs. Redshaw, 1 Saund, 201.

In *Ex Parte Koops* (6 Ves., 598,) the power of the Lord Chancellor, to alter or change a patent after affixing the great seal was presented and considered. That officer has by law full jurisdiction to control the patent and withhold the great seal upon caveat filed. *Cunningham vs. Browning*, 1 Bland, ante.)

The question as to his power after the affixing of the great seal arose in the following manner: The petitioner was a patentee for the process of making paper from straw. The prayer of the petitioner was that the Lord Chancellor would dispense with the enrollment or make some provision to prevent the specification from becoming public. This was refused. The time for enrollment having nearly expired, the patentee then prayed for an enlargement of time, in order that he might apply to Parliament for relief. It will be observed that within proper time, the petitioner had done nothing to express his dissent to or refusal to take advantage of the record. The Lord Chancellor, in answer, said: (p. 599.)

"You should have applied to the Attorney General before the patent passed, for a longer time upon the

special circumstances. I cannot take the great seal from a patent and repeal it in its most essential point. It is a legal grant, with a proviso for the benefit of all the King's subjects. You can do nothing except by an act of Parliament to enlarge the time."

In *Ex Parte Beck*, (Bro. C. C., 578,) a caveat against affixing the great seal was filed. The period for enrollment expired, the patentee mistaking the date of its commencement. The patentee, who was in default and therefore presumed to have acquiesced, petitioned the Lord Chancellor to change the date of the patent. That officer said "that although he was perfectly satisfied that the patentee was well entitled to his patent and that his case was a very hard one, he could not make such an use of his power, as keeper of the great seal, as to alter a patent in any degree upon an application of this sort." He intimated, however, that upon a new application, another patent might issue.

The case of *Doe vs. Beardsley*, (2 McLean, 419,) involved a question as to the power of the President to set aside the act of his predecessor in approving the deed of an Indian. A treaty granted lands to one Pierre Marau, with right to convey only upon the approval of the President. Marau having petitioned the President for leave to sell, that officer endorsed on the petition the following: "The request of the petitioner, Pierre Marau, is granted. John Q. Adams." The petitioner then conveyed to one Godfrey. Subsequently, he conveyed the same land to one Beardsley, claiming that he had the right to do so because of an alleged refusal by Godfrey to pay him a balance of purchase money. The second deed was presented to President Jackson, who approved it with full knowledge of the antecedent transaction. The power of President Jackson to do this was one of the questions presented in the case. The court sustained the first deed and said:

"Whatever acts may be done under the pretext of reform by the Chief Executive, unless such acts depend upon his discretion and come within his executive duties, they are utterly null and void. They can vest no right, nor afford any ground of justification, much less can they divest private interests, interests that have been acquired under the laws of the country. It is difficult to perceive upon what pretense this power was attempted to be exercised by General Jackson. He had the same power as his predecessor and no greater. The executive function having been once exercised on the subject, the power is exhausted."

The case *Ex Parte Randolph*, (1 Brock., 473) presented the question whether an auditor of the Treasury could open and restate the account of a public officer when such account had been before examined, stated and settled by his predecessor. The court held that the auditor had no such power and Barbour, J. delivering the opinion of the court, Marshall, C. J., concurring, said:

"I take it to be a sound principle that when a special tribunal is created with limited powers and a particular jurisdiction, that whenever the power given is once executed, the jurisdiction is exhausted and at an end, the person thus vested with power is, in the language of the law, *functus officio*."

In the case of *Nelson vs. Simms*, (23 Miss., 383,) it was held that one who had regularly applied for land, paid for the same, and taken a duplicate receipt from the receiver, had a good title in equity as against a subsequent purchaser who had received a patent. In other words, the court held that the land department had no power to disturb an entry of public land and that any attempt to do so was *ultra vires*.

The case of *Martin vs. Bunkenship*, (5 Mo., 346,) was an

ejectment by the holder of a land certificate against one who had a patent for the same land, issued on a junior certificate. The Commissioner of the Land Office undertook to cancel the entry of Hayden upon the senior certificate issued, and issued a patent upon the junior entry and certificate of Lewis. The court say:

"But had the Commissioner power to vacate Haydon's entry to make room for Lewis'? This is a power not given the Commissioner by the act of Congress. Haydon had purchased the land and paid for it, and the executive officers of the United States had no further control over it, unless Haydon himself had applied to have the entry changed. No person can be deprived of life, liberty or property without due process of law. The proceeding by which Haydon's entry was attempted to be vacated was clearly not a proceeding authorized by any law of the land, and was, therefore, an attempt to deprive him of his property without due process of law. If his title was defective this defect under the existing laws could be determined only in the courts of justice of the country. * * * The attempt to vacate Haydon's entry was an attempt to deprive him of his property without the intervention 'of the judgment of his peers,' against the law of the land, without 'any due process of law' and in a mode unknown to the law. In attempting to vacate Haydon's entry, then, the Commissioner attempted to do that which he had no power to do; and as he had no power to vacate it, Haydon's entry was not vacated."

The court then held that Haydon's entry and the senior certificate thereon should prevail over Lewis' entry and the junior certificate and patent thereon.

In *Arnold vs. Grimes*, (2 Clark, Iowa Rep. 1,) the court held that the Commissioner of the General Land Office could not cancel a certificate of purchase, citing Carrol vs. Stafford, (3 How., 460,) where the Supreme Court of the

United States say: "when the land was purchased and paid for, it was no longer the property of the United States, but is the purchaser's. He held it for a final certificate, which could no more be cancelled by the United States than a patent."

In *Knox vs. Pullman*, (14 La., Ann., 123,) it was held that the Commissioner of the General Land Office had no power to cancel an entry, and that a patent issued on a subsequent entry inured to the benefit of the owner of the cancelled entry, as the equitable owner of the land. And the same principle is decided in *Kelley vs. Clayton*, (2 Dev. and Batt., 249,) and *Flatherton vs. Mills*, (4 Dev., 596,).

In *Jeans vs. Lawler*, (33 Ala., 342,) the Court say:

"Two distinct offers of testimony made by the appellant were rejected by the court below. A letter from the Commissioner of the General Land Office, was embraced in each offer. This letter was but an assertion by the Commissioner, * * * of his opinion of the legality of the two different entries of the land in controversy accompanied by information as to the manner in which the entry of the defendant might be perfected. This letter was inadmissable. The opinions which the Commissioner of the General Land Office may express as to the validity of the entries of land cannot upon any principle known to us be evidence to defeat a title already granted by the proper officer."

In *Leblanc vs. Ludrique*, (14 La., Ann,, 772,) a ground of error was the refusal of the court to admit in evidence an endorsement of the Register of the Land Office, on an application made by Daniel Zeringue, October 9, 1830, in these words; "On this day, the 8th of September, 1855, Baptiste Calais, duly authorized, tendered payment for the land claimed in the written proof and was refused, in con-

sequence of the said land having been erroneously sold to Charles Leblanc, fils." The court say:

"The receiver had no authority to certify as to the agency of Baptiste Calais; nor could he make a binding entry as to the invalidity of the plaintiff's purchase.

In the case *Lick vs. Diaz*, (30 Cal, 65,) the following state of fact appeared. An alcalde, a municipal officer having authority under the ordinance known as the Plan of Petic, to make grants of town or pueblo lots, executed a grant to two persons jointly. Afterwards upon the same piece of paper, he certified that one of such grantees had renounced his right to the lots and that the other had become sole owner thereof. The question was presented whether this endorsement was sufficient to establish the fact of renunciation and show that the other grantee was sole owner. The court said:

"The title having vested in Diaz and Mesa, *en compania*, the latter could not be divested of his interest in the property at the mere will of the alcalde, even if it were conceded, that he attempted in his official capacity to do this."

Afterwards upon a second appeal, the court held, (37 Cal., 442,) that the alcalde's grant took effect without delivery, the grantees taking by the record, which, having once been made, could not be changed or cancelled by the alcalde.

In the case of *Lott vs. Prudhomme*, (3 Rob., 295,) Bullard, J., thus expressed the opinion of the court, upon the question under consideration:

"But it is shown that the Commissioner of the General Land Office instructed the Register of the Land Office to return the patents which had been issued, if they had not been delivered to the patentees and, if they had been, to advise them immediately of the illegality of their entries and to request them to return the patents in order that the purchase money might be refunded. * * * It thus

appears that the plaintiff's patents were actually issued and transmitted to the Register of the Land Office but were withheld by order of the General Land Office. It does not appear that these patents have ever been vacated or annulled nor are we acquainted with any law which authorizes the Commissioner to vacate a patent already issued."

And again, (p. 296,) "According to these principles, even admitting the right of the Commissioner of the General Land Office to cancel an entry and sale of public lands before the issuing of a patent, yet, the moment a patent has passed the great seal, it is beyond the power of the officers of the general government. It is true the instrument in this case has been withheld but we conceive that the mere possession of the parchment does not affect the right of the patentee."

Where an entry is cancelled by the Commissioner of the General Land Office the cancellation will be regarded as a nullity. The officers of the Federal Government derive their authority from the laws of that government and where their acts are not in conformity to law they cannot prejudice the rights of others. Whether the law has been complied with or not is necessarily a question for the judicial tribunal having jurisdiction of the case in which the question arises. If the court have no power to look into the authority of the officer, then his act is conclusive, and his errors or frauds are beyond redress.

Perry vs. O'Hanlon, (11 Mo., 591.)

After the patent is recorded, the executive officers of the government are without power to change it. It is the grantee's muniment of title and he is entitled to its possession when demanded.

Mitchel vs. Ryon, 3 Ohio, 377.
Hedden vs. Overton, 4 Bibb, 407.
Snead vs. Waid, 5 Dana, 188.
United States vs. Johns, 4 Dall., 416.

Sargent vs. Simpson, 8 Me., 155.
Grignon vs. Aster, 2 How., 319.

So careful are the courts to protect, in their integrity, the deeds of the government, that in North Carolina, under the act of the legislature, authorizing a proceeding in the nature of a *scire facias*, to set aside patents issued by the State for public lands, the courts have held that such proceedings cannot be maintained except by the State or by holders of prior patents.

Crow vs. Holland, 4 Dev. L., 417.
Featherstone vs. Mills, Id., 596.
O'Reily vs. Clayton, 2 Dev. & Batt. L., 249.

Counsel have attempted to arrange the various authorities cited under strictly pertinent headings. Very many of them will be found, however, to be authorities covering every point raised in the case under consideration. This is the case in *Le Roy rs. Clayton*,(2 Saw., 246,) and *Le Roy vs. Jamison*, (3 Id , p. 369,) to which we now invite the attention of the court. They were both causes involving the two patents made out in the " Gaudaloupe " case.

In the case of *Le Roy vs. Clayton*, Judge Sawyer, delivering the opinion ofthe court, said:

" The patent of March 1, 1870, took effect from the moment it was signed by the President and countersigned and sealed. Certainly, from the time it was delivered to the proper record and despatched to the Surveyor General of California to be delivered to the claimants. A delivery in the case of a government patent is not necessary. The patentee takes by matter of record." (Cases cited.) (p. 496.)

" But if something in the nature of a delivery were necessary, it has often been held that the recording of a deed by the grantor, even without the knowledge of the grantee is a constructive delivery. So the giving of it to a third party for the grantee to be delivered to him is a delivery. In

Marbury vs. Madison the court say, upon the hypothesis that a delivery is necessary, that 'it is not necessary that the delivery should be made personally to the grantee of the office. It never is so made. * * * If then, the act of livery be necessary, to give validity to the commission, *it has been delivered*, when executed and given to the Secretary for the *purpose of being sealed, recorded and transmitted to the party*. But in cases of all letters patent certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. *A formal delivery is not one of them.*" (Cases cited.) (p. 496.)

"The patent in this case was recorded in the proper records and transmitted to the Surveyor General for delivery to the owners of the Rancho, and the acts mentioned herein were as effectual to pass the title, as if the patent had been delivered by the Commissioner of the General Land Office to the patentee in person, and had been formally accepted by him. An acceptance is presumed in such cases unless the contrary appears. (See authorities last cited.)"

"If the title vested under the patent, the Commissioner of the General Land Office could not of his own motion divest it by cancelling the patent, or the record of the patent, without the knowledge or consent of those interested." (Citing Lick vs. Diaz, ante.) (p. 496.)

"The defendants as authority for cancelling the last patent, cite Bell vs. Hearne, 19 How., 262, and Doswell vs. De La Lanza, 20 How., 29.

"But these cases are not like the present. They depend upon different principles. In the last case *John* Bell had purchased the land and got his certificate of purchase. By a clerical error in the land office the name of *James* Bell was returned, and the patent made out in his name; but delivered to *John* Bell the true party. *He returned it* and had a new patent issued in the proper name. *John* Bell was the purchaser. He was the one to whom it was intended to

patent the land. The patent was delivered to him. There was no purchase by *James* Bell, and no proceedings by him, or in his name, upon which to base a patent other than that which by a clerical error accidentally crept into the return to the General Land Office. There was *no error in judgment* in determining a matter in the progress of the proceeding, for there was no proceeding, at all, by the nominal patentee. It was like commencing and prosecuting an action against *John* Bell till coming to the verdict, which is accidentally returned, and judgment thereon rendered, in the name of *James* Bell, who has never been a party, or appeared in the action. Besides, as in the case of Maguire vs. Tyler, the patent was returned by, and corrected with the assent and at the request of the real party in interest. The other case is similar, only it does not appear, except by implication, at whose request, the patent issued in the name of the wrong party was cancelled. In both of these cases there were no proceedings by purchase, or otherwise, anterior to the issuing of the patents, upon which to base them, nothing upon which the Commissioner was authorized to act in these cases, nothing to call the jurisdiction of the land office into action at all, in respect to the nominal patentee. The patents were never intended for them."

In the case of *Le Roy vs. Jamison*, Justice Field, delivering the opinion of the court said:

3 Sawyer 389

"It becomes important, therefore, to determine when a patent of the United States for land takes effect, that is when it becomes operative as a conveyance and binding upon both parties; and under what circumstances it may be recalled after it has passed under the seal of the United States, and been recorded. Some confusion has arisen in the consideration of this subject from not distinguishing between acts which bind the government, and acts which bind the patentee. It has been assumed, rather than stated, both in judicial decisions and in the argument of counsel, that

when the government is bound, the patentee is bound also, without reference to his assent on the subject; but nothing is farther from the fact. No one can be compelled by the government, any more than by an individual, to become a purchaser, or even to take a gift. No one can have property, with its burdens or advantages, thrust upon him without his assent. In order, therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. As the possession of property is universally, or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, whether the conveyance be a patent of the government or the deed of an individual, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance. There is in this respect no difference between the patent of the government and the deed of a private individual." (p. 389-90.)

"The question, then, in all cases is, when is the conveyance in a condition for acceptance by the grantee? What act of the grantor is necessary to place the instrument in a condition for acceptance? When in that condition its operation is no longer subject to the control of the grantor; what then depends upon the grantee. The answer to the question is not difficult. If the instrument be the deed of a private individual, it is in a condition for acceptance when it it is offered for delivery, that is, when the grantor has parted with its possession or the right to retain it, in order that it may be given to the grantee. (Cases cited.) If the instrument be the deed of the government, that is its patent, it is in that condition when the last formalities required by law of the officers of the government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the

records of the land office. By these acts, open and public declaration is made that so far as the general government is concerned, the title of the premises has been transferred to the grantee. The record stands in the place of the offer for delivery in the case of a private deed; the instrument is then in a condition for acceptance, and is thenceforth held for the grantee. And so the authorities are, that the grantee in such case takes by matter of record, the law deeming, as says Mr. Justice Story, speaking for th
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In view of this uninterrupted chain of concurring decisions, it is hard to conceive upon what foundation the present claim of the land department rests. In reason, and upon authority, it is an assumption of power not conferred or justified by law.

In the preparation of this brief, we have not had the advantage of any citation of authorities upon the other side

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5 Cranch 247

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In the preparation of this brief, we have not had the advantage of any citation of authorities upon the other side

of the question. So far as we know there has been, as yet, no such brief prepared. What the learning and research of the Attorney General may develope we cannot anticipate, except from our own experience in not finding a single adjudicated case in which it has been advisedly held that the land department, after the sealing and recording of a patent, had power, without the consent of the patentee, to recall and cancel the same.

The case of *Phillips vs. Sherman*, (36 Ala., 189,) has been incidentally referred to as authority for the power claimed. But the court in that case relied upon and followed what is supposed to be the authority of this court, in *Bell vs. Hearne*, (19 How., 252.) This last named case, however, decides no such question, as is shown by the opinion of Judge Sawyer, in *Le Roy vs. Clayton*, quoted above. In that case the patent was recalled *with the consent of the patentee*, a right conceded upon all sides, and expressly affirmed by this court in *Maguire vs. Tyler*, (8, Wall., 651.)

The Secretary of the Interior, in his decision of date October 8, 1879, on a motion for rehearing in the McBride case (Senate Doc. 181, 46 Cong., 2d Sess., p. 127,) relies upon the authority of *Moore vs. Robbins*, (6 U. S., p. 530.) But nothing in that case is, in our judgment, repugnant to the principle for which we are contending.

A patent had been executed and *delivered*, and upon those facts the court said that the title passed. There was no question raised, and none decided as to the effect of a patent without delivery. The court said:

"It is equally clear that when the patent has been awarded to one of the contestants and has been issued, delivered and accepted, all right to control the title has passed from the land office, * * * * and the title does so pass in every instance when, under the decision of the officer having authority in the matter, a conveyance, generally called a patent, has been signed by the President and sealed and delivered to and accepted by the patentee."

The facts of the case showed a signed, sealed, delivered and accepted patent. That was the case before the court, and it was held that such proceedings passed the title. But the court did not intend to say, nor did it say that *delivery* was necessary or that title would not have passed by signing, sealing and recording. That was a question not involved and not decided.

IX

THE ONLY MODE OF AVOIDING A PATENT IS BY BILL IN CHANCERY.

"The proper proceeding to annul a patent is by information in the nature of a bill in chancery."

People vs. Stratton, 25 Cal., 242.
Bruner vs. Manlove, 1 Scam., 161.
Moury vs. Whitney, 14 Wall., 434.
Doll vs. Meader, 16 Cal., 295.

"It can only by avoided by a direct proceeding in chancery to cancel or annul the patent."

Brady vs. Begum, 26 Barb., 529.
State vs. Bachelder, 5 Minn., 223.
Leese vs. Clark, 18 Cal., 572.
Arnold vs. Grimes, 2 Iowa, 85.
Patterson vs. Winn., 9 Pet. 663.

"If the government on a false suggestion or by mistake has granted a patent it can only be avoided by *scire facias* or other suitable proceedings instituted for that purpose."

Williams vs. Carpenter, 33. Mo., 52.

The question before the court is one of great importance. It is a matter of the highest moment to thousands of purchasers of the public land. There is a large number of undelivered patents in the files of the General Land Office.

It is almost beyond belief that thousands of such perfected grants lie unclaimed by the beneficiaries whose predecessors neglected to demand them. Should the power to cancel be once established, every undelivered patent, from the administration of Washington to the present day, can be set aside as the judgment of succeeding executive officers may dictate.

These considerations may tend to justify the length of this brief.

RECAPITULATION.

1. The patentee, Le Roy, took by matter of record ; the patent of 1866, was in-operative and was properly recalled with consent of the patentee. The patent of 1870, as recorded, evidences his grant and is his muniment of title.

2. The record was completed when the patent was signed, sealed and recorded.

3. Any attempt by the Commissioner or Secretary to alter or change, either the patent or its record, by memoranda placed thereon after recording, was in-operative to affect in any way the rights of the patentee.

4. The Commissioner of the General Land Office could not, by such an entry or memorandum, impeach his own record theretofore made.

5. Neither the Secretary nor Commissioner has power to correct, amend, or reverse the final decision of his predecessor.

6. The transmmission of the Gaudaloupe patent of 1870, to the Surveyor General, by the Commissioner, for delivery to the person entitled, was legally a delivery of the same to the said Le Roy.

7. The said patent of 1870, took effect without delivery and upon being recorded immediately passed the title of the United States to the said Le Roy.

8. Neither the Secretary nor the Commissioner have power, without the consent of the patentee, to recall and cancel a patent once signed, sealed and recorded.

9. The only method of avoiding a patent is by information in the nature of a bill in chancery or other like proceeding.

Respectfully submitted,

B. S. BROOKS,
JAMES K. REDINGTON.

Counsel for Defendants in Error in No. 266.

WASHINGTON, D. C.,
Sept. 1, 1880.

OFFICE SUPREME COURT U. S.
FILED
OCT 8 1880
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE UNITED STATES, EX REL. THOMAS McBRIDE,
vs.
CARL SCHURZ, SECRETARY OF THE DEPARTMENT OF THE INTERIOR.
No. 707.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

MANDAMUS.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This statement comes up on a writ of error to the decision of the supreme court of the District of Columbia, discharging the rule to show cause why a writ of mandamus should not issue compelling this respondent in his official capacity as Secretary of the Interior to deliver to the said relator, Thomas McBride, a patent for one hundred and sixty acres of land in the Territory of Utah, being the south half of the northeast quarter, and

lots numbered 1 and 2, of section 6, township 3 south, of range 5 west, according to the United States surveys of the public lands.

The facts in the case, fully set forth in the pleadings, are, in brief, as follows:

That in January, 1867, the legislature of Utah incorporated the city of Grantsville, including within its municipal boundaries the tract of land above described, a portion of which was then in the possession and occupation of McBride; that the land laws of the United States, including the pre-emption, homestead, and town-site laws, were extended to the Territory of Utah on the 16th of July, 1868, subsequent to such legislative incorporation; that in September, 1868, said McBride purchased of the city authorities the municipal lot or part of the block embracing his occupation and improvements, other portions of the tract now applied for by him being occupied by different municipal claimants under the city incorporation; that in May, 1869, he applied to the register of the United States land office at Salt Lake City to be permitted to enter the entire tract of one hundred and sixty acres under the homestead act of May 20, 1862; that, without knowledge by the register that the tract was within corporate limits, his entry was admitted; that in 1874 he made final proof thereon; that in February, 1877, the mayor and corporate authorities of Grantsville applied to the register to make entry of its town-site under act of March 2, 1867; that their application included the land in question; that upon refusal of the register to permit such entry while the land was included in the entry of McBride, application was made February 24, 1877, to have said entry canceled as illegally and improvidently allowed, which applica-

tion was duly forwarded by the register to the Commissioner of the General Land Office at Washington for proper action under the rules of the department; that prior to regular action thereon a patent was prepared in September, 1877, signed and sealed, and on the 3d of October, 1877, was transmitted to the register for delivery to McBride upon the surrender of the duplicate receipt; that afterward, upon taking up the record of contest for examination, the Commissioner discovered that the patent had been accidentally prepared and transmitted, and ordered its recall; that the patent was thereupon returned by the register, no demand having been made for its delivery at the date of the receipt of the Commissioner's instructions; that upon the examination of the record of contest the claim of said McBride to the land was rejected by the Commissioner, which rejection was, on appeal, affirmed by the Acting Secretary of the Interior, and afterward by this respondent on review, and the said undelivered patent was regularly canceled, together with the entry upon which it was based.

Whereupon the relator filed his petition in the court below for writ of mandamus, which was denied, and he accordingly brings his writ of error to this court.

And the respondent, defendant in error in this case, asks that the same be dismissed, and that the decision of the court below be affirmed.

ARGUMENT.

The court has no jurisdiction.

I.

Although sections 1 and 2, Article 3, Constitution, provide that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish, and shall extend to all cases arising under the laws of the United States, yet, unless Congress has, by appropriate legislation, vested the supreme court of the District of Columbia with the power or jurisdiction to issue the writ in a case like this, the court is clearly without authority. (McIntire *v.* Wood, 7 Cranch, 505, 506; McClung *v.* Silliman, 6 Wheaton, 599 *et seq.*. Secretary *v.* McGarrahan, 9 Wall., 311.) In Kendall *v*; United States (12 Peters, 618, 627), the court say: "It must be admitted, under the doctrine of this court in the cases referred to, that unless the circuit court of this District is vested with broader powers and jurisdiction, in this respect, than is vested in the circuit courts of the United States in the several States, then the mandamus in the present case was issued without authority."

The power or jurisdiction to issue the writ of mandamus in a case like this must be found, if it exist, in some law of Congress. It is true that the court in Kendall *v.* The United States held that the circuit court of the District of Columbia had jurisdiction by virtue of the first, third, and fifth sections of the act of February 27, 1801 (2 Stat., 104–106). See particularly the reasons

advanced by the court for so holding, and also the dis senting opinions of Chief Justice Taney and Mr. Justice Barbour.

But the law which the court in Kendall *v.* The United States and in subsequent cases, including that of the Secretary *v.* McGarrahan, decided in December, 1869 (9 Wall., 298), held as vesting the circuit court of the District of Columbia or the supreme court of said District with power and jurisdiction to issue the writ of mandamus to an executive officer to perform mere ministerial acts not involving the exercise of judgment or discretion *is repealed.*

By the revision of the Statutes at Large relating to the District of Columbia certain sections are substituted for the repealed statute, clearly setting forth and defining the legislative will respecting the continuing powers and jurisdiction of the court; and if such statutory enactment differs in language or construction from the repealed provisions the new law must prevail for all future cases. (Bowen *v.* United States, October 7, 1879, S. C.)

Section 61 gave power to the legislative assembly to modify the practice and enlarge the jurisdiction of the courts of the District whenever necessary to the due execution and enforcement of the laws of the District.

Section 89 continued in force the organization of the judicial courts.

Section 91 continued in force the local municipal laws.

Section 92, which is first in importance in this connection, continued in force the laws of the State of Maryland *not inconsistent with this title*, as the same existed on the 27th of February, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed.

Section 93 declares that the Constitution and all laws of the United States not locally inapplicable shall have the same force and effect within the District as elsewhere within the United States.

These are the existing provisions relating to the District laws, and they undoubtedly include whatever of the former law of Maryland may be found necessary to the proper administration of justice in the District as local law, contradistinguished from what is known as United States law; that is, the Maryland law governing local and individual rights and transactions between man and man is preserved in its local application and for all the ends of municipal and local government. Whatever goes beyond this and relates to officers of the United States as such, whose duties are supposed to be the same whether in or outside the District of Columbia, trenches upon the domain of the United States law, and must be considered as general and not local in character. As to such general laws they must be applied with the same force and effect in the Distirct of Columbia as elsewhere within the United States. (Section 93 cited). If no local reason exists for enlarging their scope they have no exclusive application in the District.

Now, when we come to look at the Revised Statutes providing jurisdiction for the courts of the District, we find (sections 760–762) that the *same* jurisdiction is prescribed as that possessed and exercised by the circuit and district courts of the United States. This must be the measure of the general jurisdiction of these courts.

Then comes (in section 763 as amended by act of February 27, 1877, 19 Stat., 253) the granting of the local jurisdiction necessary to the enforcement of the laws pre-

viously cited, and which confers upon the United States courts in the District power to act as local courts in matters within their territorial jurisdiction, which, without such legislation, would be barred from the jurisdiction conferred upon them as circuit and district courts. This jurisdiction is bounded by sections 767–769, with respect to original pleas; subordinate and inferior causes being confided to the jurisdiction of justices of the peace under chapter 31 of said revision of the laws of the District.

Now, while it is true that the common law was in force in Maryland in 1801, and came by statute into the District of Columbia as a part of the law then introduced, yet the power of the circuit court of the District to exercise this jurisdiction to issue the writ of mandamus to executive officers under this common law was said, in Kendall *v.* The United States, to result from its analogy as the highest judicial tribunal within its jurisdiction to the highest Maryland court, and that its power was conferred by the third section of the act of February 27, 1801, giving it the same jurisdiction as the circuit courts of the United States at that date, and that the subsequent repeal of the statute which was held to confer the right upon other circuit courts did not change the law in the District of Columbia, because the law respecting their jurisdiction, as it stood at the date of the enactment, must control the construction of the act of February 27, 1801, and not the law as it existed subsequent to the repeal.

But as the third section of the act of February 27, 1801, is repealed, and in lieu of that statute the grant of "the same jurisdiction as the circuit courts of the United States" is made by the act of revision, June 22, 1874, the

construction must be referred to the law as it stood at the latter date, and not to the 27th of February, 1801 (2 Stat., 103). And, as before stated, all the authorities are agreed that since the repeal of the act of February 13, 1801 (2 Stat., 89), on the 29th of April, 1802 (2 Stat., 156), no such jurisdiction has been conferred on the circuit courts of the United States.

The court, then with respect to this writ, has the same powers and exercises the same jurisdiction as the circuit courts of the United States. It will be found by examination of the cases of McClung *v.* Silliman (6 Wheat., 601); McIntire *v.* Woods (7 Cranch, 504); Riggs *v.* Johnson County (6 Wall., 197, 198); Smith *v.* Jackson (1 Paine, C. C., 453); the Secretary *v.* McGarrahan (9 Wall., 311); Kendall *v.* United States (*supra*); United States *v.* Smallwood (2 Am. L. T. Rep., 109); Graham *v.* Norton (15 Wall., 427); that since the repeal of the act of February 13, 1801, by act of April 29, 1802, the United States circuit courts cannot issue the writ of mandamus to executive officers, but that their power to issue the writ is limited to cases in which it may be necessary to the exercise of their jurisdiction already acquired. Mandamus "when issued by a federal court is never a prerogative writ." When issued it is to be regarded as a writ necessary to the jurisdiction of the circuit court, which had previously attached, and to enforce its judgment. (Riggs *v.* Johnson County, 6 Wall., 166.)

In 9 Wall., 311, the court say: "Since the decision of this court, in the case of McIntire *v.* Wood, it has been regarded as the settled law of the court, that the circuit courts of the United States in the several States do not possess the power to issue writs of mandamus,

except in cases in which it may be necessary to the exercise of their jurisdiction."

Now, an examination of the Revised Statutes (sec. 629, &c.), and the act of March 3, 1875 (18 Stat., 470), will show that their jurisdiction in this regard has not been enlarged, and that, therefore, it is to-day the settled law that the United States circuit courts cannot issue writs of mandamus to executive officers.

The broader powers conferred by the acts of 1801 and 1863 upon the supreme court of the District of Columbia having been repealed, and the court being now limited to "the same powers," and to the exercise of "the same jurisdiction as the circuit courts of the United States," it follows that the supreme court of the District has no power to issue the writ prayed for in this case.

II.

If the supreme court of the District of Columbia has jurisdiction to issue the writ to executive officers of the United States in any case, such jurisdiction does not extend to acts involving the exercise of judgment and discretion. The issue of a patent for public land of the United States under the laws of Congress is such an executive act. The adjudicated cases upon these points are numerous and explicit. It is not necessary to restate the argument upon which the decisions rest. The authorities are all agreed upon both propositions. (See McIntire *v.* Wood, 7 Cranch, 505, 506; McClung *v.* Silliman, 6 Wheaton, 599, *et seq.;* Kendall *v.* United States, 12 Peters, 526; Decatur *v.* Paulding, 14 Peters, 353; Brashear *v.* Mason, 6 How., 92; United States *v.* Seaman, 17 How., 225; United States *v.* Guthrie, 17 How., 284; Bell *v.* Hearne, 19 How., 252; Doswell *v.* De la

Lanza, 20 How., 29; Maguire *v.* Tyler, 1 Black, 195, 8 Wall., 664; Commissioner *v.* Whitely, 4 Wall., 534; United States *v.* Commissioner, 5 Wall., 563; Riggs *v.* Johnson County, 6 Wall., 197; Gaines *v.* Thompson, 7 Wall., 347; Secretary *v.* McGarrahan, 9 Wall., 298; Litchfield *v.* Register, 9 Wall., 575; United States *v.* Wright, 11 Wall., 648; Johnson *v.* Towsley, 13 Wall., 72; Shipley *et al. v.* Cowen *et al.*, 1 Otto, 336; Moore *v.* Robbins, 6 Otto, 530; Snyder *v.* Sickles, 8 Otto, 211; Marquez *v.* Frisbie *et al.*, No. 78, Oct. 1879; Vance *et al. v.* Burbank *et al.*, No. 553, Oct., 1879. These cases, all considered, sufficiently explain the general doctrine announced in Marbury *v.* Madison (1 Cranch, 150), cited by counsel for McBride in this case. See especially Gaines *v.* Thompson (7 Wall., 347), wherein the power of the Commissioner to cancel an entry of the public land is expressly sustained, and the classification made in the Marbury case is modified.

III.

To the complete issue of such patent delivery is essential.

This conclusion may be drawn from the language of the law. Section 453 of the Revised Statutes requires the Commissioner of the General Land Office to perform, under the direction of the Secretary of the Interior, "all executive duties" which relate to "the issuing of patents for all grants of land under the authority of the government." Section 458 prescribes the requisites as to form, signature, and record.

Section 459 provides for a special officer to complete the issue, "in pursuance of instructions from the Commissioner," by certifying, affixing the seal, engrossing,

recording, and transmitting such patents. These are the prescribed "executive duties" which relate to the issuing of the patent as previously assigned. Each statutory proceeding is essential to the operation of the whole.

In McGarrahan *v.* Mining Company (6 Otto, 316), it is said that "the patent executed in the prescribed form which issues from the General Land Office is made the instrument of passing title out of the United States." Here it is obvious that the execution in the prescribed form is referred to as quite distinct from and independent of the issue from the General Land Office. Execution is not issue, nor does it issue by the record, for it is immediately said by the court that "the record called for by the act of Congress is made by copying the patent to be issued into the book kept for that purpose. The effect of the record, therefore, is to show that an instrument such as is there copied has actually been prepared for issue from the General Land Office." The issue from the office must, in pursuance of this doctrine, mean something beyond and subsequent to the recording, and the next statutory duty named in section 459 is the "transmission" of such patent. Here is the final executive duty connected with the instrument itself, and by it delivery to the patentee must be intended. It will not do to say that this does not mean delivery without suggesting any other possible definition. And it is a well established regulation of the General Land Office to require this duty of the recorder, and settled rules are published governing the transmission of patents to the patentees through the intervention of the district officers as agents of the government, or directly from the General Land Office, possession of the instrument never being given

to the grantee except upon surrender of the duplicate receipt, or proof, by affidavit, of its loss. For authority to issue such regulations see Snyder *v.* Sickles (8 Otto, 211; section 2478, R. S.).

This delivery, then, is an official executive act necessary to the complete issue of the patent, and essential to its operation to pass the title of the United States. The delivery, personally, by the recorder is said to be a better recognition of its validity than the record itself. (McGarrahan, *supra*, p. 322.) And again on page 323, in speaking of the effect of an imperfect instrument perfectly recorded or a perfect instrument imperfectly recorded to prove a grant, it is said "if a perfect patent has in fact issued it must be proved in some other way than by the record."

The issue, which, it has been shown, is subsequent to the record, and can only mean delivery, is treated as the thing to be proved—all the matters of record are but instruments of evidence to establish the *fact of issue.* And so the court say: "When a right to a patent is complete, and the last formalities of the law in respect to its execution and issue have been complied with by the officers of the government charged with that duty, the record will be treated as presumptive evidence of its delivery to and acceptance by the grantee." And in the final clause it is said that the defective record will be treated as a perfect record of an imperfect instrument "until overcome by proof that the instrument as executed and delivered was valid." The only reasonable inference from these repeated allusions to the delivery and possession of the patent is that delivery is deemed by this court essential to the complete issue of the patent and the conveyance of the legal title.

And to the same effect is Moore *v.* Robbins (6 Otto, 530): "When the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title, or to decide on the right to the title, has passed from the land office."

Again: "If * * * the patent * * * is delivered to and accepted by the party, the *title* of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed." This moment of delivery and acceptance is the instant when authority and control over the title cease, and the issue is complete in law. Up to that moment executive control, authority, and discretion continue, and the official and executive function, which cannot be interfered with by the courts, remains unimpaired in the officer having original power in the matter. So the court say: "The functions of that department necessarily cease when the title has passed from the government. And the title does so pass where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee."

This is the effect of the executive acts, done within the scope of legal authority. The inquiry was specially directed to the authority of the department in land cases, and was comprehended in the pertinent question addressed by the court to itself on page 534: "If such a power exists, when does it cease?" And in answer, three times asserted, the precise period of time, none other being suggested, is the delivery and acceptance of the patent. The patentee, taking by matter of record

the grant of the government, may rely on such record, after complete issue and delivery of his patent, for proof that it was so delivered and accepted. The record is undoubtedly presumptive evidence of the delivery, as it is also of the validity, of the grant; but it does not operate to complete title without such delivery. And, in 2 Blackstone, 348, it is said that the king's grant, if he grants an estate contrary to law, or if his own title to the thing granted be different from what he supposes, is absolutely void.

And, Washburn on Real Property (vol. 3, p. 520), says that the patent "when regularly and properly issued, becomes a complete evidence of title."

We have sufficiently shown that delivery is essential to the issue. Up to that time its regularity and propriety can only be inquired into by the Interior Department. The courts have not yet acquired jurisdiction.

In Bell *v.* Hearne (19 How., 252), and Maguire *v.* Tyler (1 Black, 195, and 8 Wall., 664), patents had been prepared and delivered, but the court held that as there was no acceptance the delivery was not good and the recall and cancellation were proper, leaving the *status* of the land precisely as it was before execution of the instruments. In the first case, the patent had reached the true grantee, John Bell, but by error in the certificate of entry it had been executed in favor of James Bell, and by assignment the land had passed to other parties as his property. But the court sustained the recall of the patent, surrendered by John Bell, against the claim of James Bell, who alleged that he was the grantee *of record*, and gave as a reason that the patent had never been delivered to *him*.

These cases cannot be explained except upon the

theory that the delivery was essential; that a refusal to accept the patent prevented such delivery, and upon its return to the possession and jurisdiction of the Commissioner, he had power to cancel both it and its record, and make rightful disposition of the land according to its *status* before execution of the instrument.

For, if the record proved title instead of proving delivery of the instrument, the title of the United States had passed without delivery, and to restore it reconveyance would have been required. But the court say that the *status* of the land was the same after recall as before the preparation of the patent. Never having been effectually delivered, its possession by the Commissioner gave him jurisdiction for good cause to cancel it. (Doswell *v.* De la Lanza, 20 How., 29.)

In the case of McBride we accordingly submit that he can take nothing by the mere execution and recording of his patent *without* delivery; and that if mistake in the condition of the title or want of authority to issue it be discovered before completion of its issue by delivery, no title or right depending on such execution has passed to him, and the department may treat it as void and proceed to dispose of the land according to law. (See cases cited.) Title by matter of record, as shown by the authorities cited by counsel for McBride, differs from feoffment only in dispensing with livery of seizin, and does not dispense with delivery of the instrument. And this is true in most cases of deed by private individuals, as well as municipal bodies, in the American States. But such deed only takes effect from delivery. (County, &c., *v.* American Emigrant Company, 3 Otto, 127.)

Counsel for McBride seem to admit this reasoning. They say: "The patentee, Le Roy, took by matter of

record; the patent of 1866 was inoperative, and was properly recalled with consent of the grantee." (Brief of Brooks & Redington, p. 52.)

If inoperative, it must have been so for want of delivery, not for want of execution and record. Why was not reconveyance necessary if title passed without delivery?

IV.

Constructive delivery can only be predicated upon the circumstances of the particular case. It may and does exist where the grantor, in the exercise of his proper authority, places the deed in the hands of a stranger for the use of the party, or even in some cases where he retains possession, at the same time sufficiently manifesting his intention to treat it as having passed the title to the use of the grantee.

But the doctrine of constructive delivery cannot prevail in this proceeding, because the petition admits and the record shows that the instrument has never passed from the custody of the government, and the alleged grantee is now suing for its original delivery. He sets up the demand for delivery and refusal of the register to accede to his demand, followed by the subsequent refusal of this respondent, as the cause of action in the case at bar, and prays for the extraordinary writ of mandamus to enforce such demand. He cannot be permitted to assert that the patent has already been constructively delivered. To do so would be an admission that he has no right to the remedy sought; as he would, in such case, have ample power to assert his title by the ordinary judicial proceedings.

Constructive delivery cannot be presumed, for the

further reason that at the date of the demand it had become known to the proper officer that he had no right to issue it; that he had mistaken the true condition of the title of the government; that he was forbidden by law to make the patent; that he had not considered the contest and made any award in the case; consequently he had no authority to deliver it to McBride as the act of the government.

The direction to deliver was made to a subordinate official. It was to take effect only upon the express acceptance of the patentee, by surrender of the outstanding duplicate or proof of its loss. It was a direction which might be revoked upon discovery of sufficient reason to defeat the efficacy of the patent, just as final delivery might have been refused by the Commissioner had it remained in his personal custody.

The fact that patents are permitted to lie, sometimes for years, in the files of the General-Land Office, before they are called for by the grantees, does not prove that a constructive delivery must be presumed in all cases where they so remain. Whether title in such cases really passes out of the government by matter of record must be determined in each case as it arises. If no question be made against the record, and it should be certified according to law by the Commissioner as a record, such action would probably estop the government to afterward deny its verity and effect, as proof of delivery and conveyance. But the existence of such a general fact cannot, assuredly, be held to prove that in a case where suit is brought to compel a delivery, which can only be maintained upon the assumption that there has been no delivery, the thing sued for has already in contemplation of law been even constructively delivered.

V.

Even if delivery be not essential to pass the title under a patent, the patentee cannot be aided by this writ to recover the instrument, when it is shown to the court that he has no right in law to receive it.

The land described in the patent is admittedly within the corporate limits of the town site of Grantsville, which limits were created and declared by act of the Territorial legislature of January 12, 1867. McBride's entry was made May 31, 1869. The land, therefore, was by express statutory provision excepted from the operation of the pre-emption law; for the same act that established the limits of Grantsville incorporated the town. The 10th section of the act of 1841 (5 Stats., 456) provides that "no sections or fractions of sections included within the limits of any incorporated town; no portions of the public lands which have been selected as the site for a city or town," &c., "shall be liable to entry under and by virtue of the provisions of this act." (Revised Stats., sec. 2258.)

In the case of Root *v.* Shields (1 Woolw., 356, 357), it was held that land within the incorporated limits of a town came within the exception of the statute first above quoted, notwithstanding such limits embraced more land than the town would be entitled to enter under the town-site laws. It cannot be claimed that McBride acquired any right to the land by virtue of his settlement in 1862, because, 1st, he has never claimed the land under the pre-emption law, or otherwise than under his homestead entry; and, 2d, the pre-emption and homestead laws were not extended to Utah Territory until 1868. (15 Stat., 91; Stark *v.* Starrs, 6 Wall., 402, third paragraph of syllabus;

Lownsdale *v.* City of Portland, 1 Deady, 1). In fact, the original homestead law was not enacted to take effect until January 1, 1863, several months subsequent to his alleged settlement.

And, just at this point, under the first of these reasons, it is desired to ask the especial attention of the court to the distinctive and essential difference between the pre-emption and homestead laws relative to the inception and establishment of a claim. By the former, a person having certain prescribed qualifications is clothed with power, by an act of personal settlement upon land subject to such appropriation, to obtain title to such land by continuance of such settlement, accompanied by filing of proper notice, and after full proof of compliance with the law, and upon making payment of the purchase money. His first act, the initiation of his claim, to which all subsequent acts, including the receipt of patent, relate, is the act of settlement in person upon the land. His filing, proof, payment, and final entry are all subsequent to and dependent upon this.

By the latter, the first prescribed act is the making of a formal application for entry at the district land office, accompanied with an affidavit setting forth that the "entry is made for the purpose of actual settlement and cultivation." There was, prior to the recent act of May 14, 1880, no preference right to make such entry on account of previous settlement. Such preference could only be secured under and by compliance with the provisions of the pre-emption laws. The initial act of the settler is the making of the application, and the proof of the settlement and cultivation only relates to "the term of five years immediately succeeding the time of filing the affidavit aforesaid." The subsequent and dependent

acts here all relate to the initial act of filing the application and affidavit with the register of the land office. (See these statutes; also Shepley *v.* Cowan, 1 Otto, 337; Lansdale *v.* Daniels, 10 *id.*, 113, and numerous other cases.)

Upon the second reason, the bar to a legal settlement under either the pre-emption or homestead laws is equally conclusive; for it will not be contended that such settlements might legally be made, or appropriate lands not yet brought under the operation of these statutes. The act of July 16, 1868, is express in declaring "That the pre-emption, homestead, and other laws of the United States applicable to the disposal of the public lands are hereby extended over said district." Manifestly these laws could not be extended over a district where they already had effect; and, in fact, they had not been previously given any effect in the Territory of Utah.

Now add to the above the further facts, that prior to the preparation of said patent the authorities of Grantsville claimed said land under town-site laws of 1867 (14 Stat., 541); that there was a contest pending before the Land Office between the town authorities and McBride; that such contest, involving the right of the respective parties, was undetermined when said patent was prepared; that, therefore, the patent was prepared in violation of law and the rules of the department by some accident or mistake, and it necessarily follows that the power to adjudge whether a patent ought to issue had not been exercised by the Commissioner in the first instance, nor by the Secretary on appeal, and those officers were not precluded from further examining and deciding the case according to the rules and regulations established by the department. Nor could the Com-

missioner, having both parties before him, deprive either of the right to a full showing and the usual and accepted right of appeal by the hasty, arbitrary, negligent, and unauthorized delivery of such patent to the other contestant. There was, therefore, no legal decision of the Commissioner or Secretary upon the rights of the parties, or upon the question of the issue of a patent to McBride; because, from the very nature of the case, as said in the McGarrahan case (9 Wall., 311), the Commissioner and Secretary were bound to exercise these powers of judgment and discretion; and the plain duty was, the mistake being brought to the attention of the Commissioner, to withhold the patent until the rights of the parties to the contest were determined. (Litchfield *v.* R. & R., 9 Wall., 578, which is conclusive of this case.)

The facts now presented to the court show that the party has no right to the land, and that the department is, consequently, without jurisdiction to issue a patent. Under these circumstances will the court command the Secretary to arm the petitioner with a muniment of title which it would be the duty of the proper officers of the government immediately to proceed to have set aside or annulled by some judicial tribunal?

The facts of the case also show that the town authorities claimed the land under town-site laws; that they had the right to be heard before the Commissioner and Secretary as to their right or interest in or to the land. It follows that such right ought not to be precluded by the issuance of a patent to the opposing party prior to decision of the contest; and, furthermore, that such patent would be against law and right.

Under this state of fact the court in 1877 could not

have commanded the issue of patent, admitting jurisdiction for the reasons above given; which also show that there was no authority of law for its issuance; and for that reason *mandamus* would not lie. (Commonwealth *v.* Boutwell, 13 Wall., 529.)

Furthermore, the court would not have commanded the issue of the patent, because the facts show that further action was required of the land department; and whenever, in the disposition of the public lands, any action is required to be taken by any officer of the land department, all proceedings tending to defeat such action are impliedly inhibited. (Shepley *et al. v.* Cowan *et al.*, 1 Otto, 336.)

This land was not subject to entry under the pre-emption law, and land excluded from pre-emption is not subject to entry under the homestead law. (Sec. 1 act of May 20, 1862, and sec. 2289 U. S. Rev. Stat.)

Therefore, the exception of lands within town-site limits from the operation of the pre-emption law applies equally to the homestead law. Hence in 1869 the land was not subject to entry by McBride and his entry was illegal, and the issuance of a patent thereon would be equally so. "No title can be held valid which has been acquired against law. * * * The patent of defendant having been for lands reserved from such appropriation is void." (Stoddard *v.* Chambers, 2 How., 317, 318; Ross *v.* Barland, 1 Peters, 656; Lindsay *et al. v.* Miller, 6 Pet., 674; Brown *v.* Clements, 3 How., 655, 656, 657; 5 Op. Att. Gen., 9.) Also Newhall *v.* Sanger (2 Otto, 761), where it is held in effect that the patents to the railroad company, not having been issued in "compliance with the requirements of the acts of Congress, commonly known as the Pacific Railroad acts", were invalid and

passed no title. (See also Reichart *v.* Felps, 6 Wall., 160; Parkinson *v.* Bracken, 1 Pinn., 174; Shepley *et al.* *v.* Cowan *et al.*, 1 Otto, 333; Wirth *v.* Branson, 8 Otto, 118; Stark *v.* Starrs, *supra.*)

The court will not command the issuance of a patent, or the delivery of one improvidently prepared, which neither the Commissioner nor Secretary has any authority to issue.

In the case of McGarrahan *v.* New Idria Company (49 Cal., 335) the court say: "Neither the President, however, nor any (other) officer has other power to dispose of the public domain, or to sign, or to cause the seal of the Land Office to be affixed to patents, than such as is conferred by statutes of the United States." (See also Park *v.* Duff, 47 Cal., 554.)

There is no authority to sign, or cause the Land Office seal to be affixed to McBride's patent; because there is no power or jurisdiction, nor was there in 1877, to dispose of the land under the homestead or pre-emption laws, and the Commissioner can issue patents only under authority of the statutes. (Acts April 25, 1812, July 4, 1836, and sec. 453 U. S. Rev. Stat.)

The case of the relator is reduced to this: By some accident a patent has been prepared, signed, and the seal of the General Land Office affixed thereto, for land expressly excepted from disposal by the law under which the relator claims; the patent if delivered would pass no title; its illegal preparation and execution are discovered before it has passed from the possession of the Interior Department, and before decision as to the right of the party named therein has been made; the patent is withheld pending the final disposition of the contest involving the title to the land, and the decision is against

the right of the party named in the patent. Notwithstanding this, the court is asked to command the Secretary to deliver this illegal and void patent.

This is the case now before the court.

No authority existed for the issuance of the patent in any event before the final decision of the case; and it is evident that if a writ of mandamus would not have issued prior to decision to compel the delivery of the patent, it cannot be granted now; for there is no authority on the part of the court to review the proceedings in the contest before the department, as has been already sufficiently shown; and the judgment of the Secretary upon the case pending at the time the patent was accidentally prepared is against the right of the relator to a patent for the land.

From the foregoing it is also clear that McBride never had any right to said patent, and therefore he is not wronged or injured in any manner by its being withheld; and for this reason the petition ought to be dismissed. And for any supposed injury he may have ample remedy. If title be really in him, as he sets up in his petition, he may maintain the same by action at law or equity, if his possession be adversely disturbed; or he may await the final disposal of the land by the executive department, and bring suit to have the title declared in trust for him by the proper decree of the judicial tribunals. (Johnson *v.* Towsley, 13 Wall., 84–86, and the numerous cases there cited; Moore *v.* Robbins, 6 Otto, 535.)

This point admits of no controversy. If, therefore, as alleged, the relator has title to the land, he has mistaken his remedy; as stated in United States *v.* Commissioner (5 Wall., 565).

It follows, therefore, that there is no such thing in this case as an investiture of title by virtue of this improvidently prepared patent upon which to base a demand for actual delivery. The doctrine that the law presumes that to be done which is required to be done does not apply here, for the law does not require delivery of patent to McBride, but, on the contrary, such delivery would be illegal. The Secretary cannot be compelled to do an unlawful act, or an act beyond his lawful power, jurisdiction and authority.

Again, the facts show that other parties claim the land, by virtue of an act of Congress, who are not before the court, and whose rights would be affected by the granting of the writ; and for this reason the writ should not be granted. (United States *v.* Commissioner, 5 Wall., 563.) This case in 5 Wallace seems to be conclusive against the petitioner. (See also Litchfield *v.* Register and Receiver, 9 Wall., 578.)

The granting of the writ would involve not only a review of the facts upon which the patent was withheld, but a review of all the proceedings had and decisions rendered in the matter by the Commissioner and Secretary from first to last and a reversal of such decisions, which is manifestly not within the powers or jurisdiction of the court.

VI.

The fact that McBride, subsequent to the withholding of the patent, consented to appear in the contest proceedings relating to the town-site application is of the highest importance. The appeals and motions for review were all in his behalf, under and in conformity to the regular rules of practice in the Department, and his last motion before the Secretary of the Interior, as shown

by the exhibit on page 17 of the record in this cause, was for a new trial in the case. He appears to have recognized the jurisdiction of the Secretary to send the case back for a new trial; a jurisdiction altogether inconsistent with the doctrine that title had completely passed by the formal preparation of the patent for issue.

Attention is also invited to his application to the town authorities in September, 1868, after the extension of the land laws to Utah, for title to the municipal lot occupied by him in block No. 38, of the corporate survey, instead of making application to the United States land-office to secure a pre-emption right as a settler upon the whole quarter section according to the United States surveys. He acknowledged the right of the city authorities and made purchase of the lot in regular form. (See Exhibit E of the Record in the case, page 20.) This must be considered as an election to hold under the townsite, and is inconsistent with a purpose at that date to seek title from the United States. "He is concluded by his election made at this time." (Warren *v.* Van Brunt, 19 Wall., 654.)

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